

(2012) 08 RAJ CK 0002
In the Rajasthan High Court
Case No : CWrit Petition No. 6608 of 2011

Cox and Kings India Ltd.

APPELLANT

Vs

Narendra Singh Rathore and Another

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Rajasthan Shops And Commercial Establishments Act, 1958 — Section 28(A)

Citation : (2013) LabIC 622

Hon'ble Judges : Munishwar Nath Bhandari, J

Bench : Single Bench

Advocate : A.K. Sharma and V.K. Sharma, for the Appellant; S.R. Surana and Abhishek Kumar Bhargava, for the Respondent

Judgement

Munishwar Nath Bhandari, J.—By this writ petition, a challenge is made to the order dated 28th March, 2011 passed by Prescribed Authority, Rajasthan Shops and Commercial Establishment, Jaipur City, Jaipur. It is a case where an application was moved before the prescribed authority to challenge termination w.e.f. 6.7.2009. The notice was issued and served upon the petitioner company. A reply was filed showing that termination has been effected vide order dated 25th August, 2009. The respondent employee sought amendment to challenge the order dated 25th August, 2009. It was allowed, accordingly. Certain prayers were added over and above the original prayers.

2. The learned counsel for petitioner submits that respondent employee was engaged on agreed terms, which comes out from the order of appointment. A clause exists regarding termination of service by giving three months notice or salary in lieu thereof. Pursuant to the terms and conditions of the appointment, the order of termination dated 25th August, 2009 was issued. The respondent employee approached the authority at a premature stage, when even order of termination was not passed. The Authority can be approached only when a written order of termination is passed. Thus, initial application was not even

competent, hence, if should have been dismissed on the aforesaid ground alone.

3. It is further urged that at the time of issuance of order on 25th August, 2009, three month's salary was offered and accepted by respondent employee, thus it takes care of Section 28-A of the Rajasthan Shops and Commercial Establishment Act, 1958 (for short "the Act of 1958") which require one month's notice pay or salary in lieu thereof. The respondent employee accepted the notice pay and even Provident Fund, which is a token of acceptance of the order of termination dated 25th August, 2009. The order clarifies that respondent employee will withdraw the application filed before the Authority as the notice pay and other benefits were offered to amicably settle the matter. It was also provided that if respondent employee is not in agreement, then not to accept the amount. Since respondent accepted the amount, it should be taken in full settlement. The aforesaid aspect has been ignored by Authority. In fact, validity of the order dated 25th August, 2009 has not even been adjudicated. The order under challenge does specify as to how order dated 25th August, 2009 is illegal.

4. If it is assumed that action of the petitioner was in violation of Section 28(A) of the Act 1958, then also as per sub-sections (3) and (4) of Section 28(A) of the Act, the Authority is having discretion to allow compensation. However, in the present matter, order for reinstatement has been passed in ignorance to the aforesaid provision. The respondent employee has been allowed reinstatement with consequential benefit ignoring the fact that evidence was not led by him regarding unemployment during intervening period whereas burden was on him to prove the aforesaid. In order to substantiate the arguments aforesaid, Division Bench judgment of this Court in the case of State of Rajasthan v. Ramesh Kumar reported in 2011 WLC (Raj.) UC p. 85 has been referred, therein Division Bench of this Court held that burden to prove unemployment during the intervening period lies on the employee. In the present matter, no evidence was led by the employee regarding his employment, rather there was no pleading or argument in this regard. Thus also, impugned order deserves to be set-aside.

5. The Authority further failed to consider that termination was as per terms of agreement thus shows reasonable cause, hence action of the petitioner company was in conformity with provisions of Section 28(A) of the Act 1958. The prayer is accordingly to set-aside the impugned order passed by the Authority.

6. Learned counsel for respondents on the other hand supported the order of the Authority. It is stated that petitioner was terminated on 6.7.2009, hence, respondent employee rightly approached the Authority as no written order is required for maintaining application u/s 28(A) of the act of 1958. The order dated 25.8.2009 was passed after notice was issued by the authority and served on the petitioner company. This was to fill up the default and violation of Section 28(A) of the Act of 1958. It is further stated that respondent employee had accepted the amount under protest, which was clearly stated in the evidence. The respondent employee had no means to carry out his livelihood thus under compulsion and with protest the amount was accepted. In any case, acceptance,

of amount does not validate the order of termination passed in violation of Section 28(A) of the Act. The principle of estoppel does not apply contrary to the statutory provisions. It is also stated that adjudication by the authority was in reference to the order dated 25.8.2009 also. Thus, the impugned order has been passed after taking note of each and every aspect of the matter.

7. So far as relief given to the respondent employee is concerned, a discretion lies with the Authority to award compensation or reinstatement or both. The respondent employee was ordered to be reinstated in the facts and circumstances of the case and burden to prove unemployment does not lie on the employee but it lies on the employer to prove gainful employment of the employee during intervening period. Thus, there is no illegality in the impugned order passed by Authority concerned.

8. I have considered the rival submissions and perused the record carefully.

9. The order dated 28.3.2011 has been assailed on many fold grounds. Thus, the issues are considered as under:--

1. Whether an application u/s 28-A of the Act is maintainable only when an order of termination is issued in writing or it can be even in the case of oral termination?

10. To answer the aforesaid question, it would be gainful to quote Section 28-A of the Act which is quoted here under:--

Section 28-A--Notice of dismissal or discharge by employer:--(1) No employer shall dismiss or discharge from his employment any employee who has been in such employment, continuously for a period of not less than 6 months except for a reasonable cause and after giving such employee at least one month's prior notice or on paying him one month's wages in lieu of such notice;

Provided that such notice shall not be necessary where the services of such employee are dispensed with for such misconduct, as may be defined in the rules made by the State Government in this behalf and supported by satisfactory evidence recorded at an enquiry held for the purpose in the prescribed manner.

(2) Every employee so dismissed or discharged may make a complaint in writing in the prescribed manner to a prescribed authority within 30 days of the receipt of the order of dismissal or discharge on one or more of the following grounds namely,

- (a) That there was no reasonable cause for dispensing with his services; or
- (b) That no notice was served upon him as required by sub-section (1); or
- (c) That he had not been guilty for any misconduct.

Provided that the prescribed authority may condone delay in filing such a complaint, if it is satisfied that there was sufficient cause for not making the complaint within the prescribed time.

(3) The prescribed authority shall cause a notice to be served on the employer relating to the said complaint, record briefly the evidence produced by the parties, hear them and make such enquiry as it may consider necessary and thereafter pass orders in writing giving reasons therefor.

(4) While passing an order under sub-section (3), the prescribed authority shall have power to give relief to the employee by way of reinstatement or by awarding money compensation or by both.

(5) The decision of the prescribed authority under this section shall be final and binding on the employer and the employee.

11. A perusal of the Provision quoted above does not require that a complaint can be maintained only when the order of dismissal or discharge in writing. Accordingly, respondent employee was within his right to maintain an application on oral termination. If the argument of the learned counsel for petitioner is accepted, it would be very easy for the employer to escape from Section 28-A of the Act by issuing oral order of termination and thereby very purpose of enactment of 1958 would be frustrated. Rule 24-B of Rajasthan Shops and Commercial Establishment Rules, 1959 (for short "the Rules of 1959"), no doubt, provides limitation to maintain an application and it is from the date of receipt of written order of termination. The purpose of Rule 24-B of the Rules is for the purpose of limitation and does not provide a condition that application would be maintainable only when order of termination is in writing. Further more, a rule cannot nullify provision of the Act, when Section 28(A) of the Act does not require a written order of termination to approach the Authority. Accordingly, Rule 24-B has to be given interpretation to make it in conformity with provisions of Section 28(A) of the Act.

12. It is further more and in the alternative that petitioner company passed written order of dismissal on 25th August, 2009, therein termination has been effected from 7.7.2009. Thus, application moved after 7.7.2009 become competent as application was allowed to be amended and the order to amend the application has not been challenged by the petitioner. Thus the first argument raised by the counsel for petitioner cannot be accepted because by virtue of amendment, application was against the written order of dismissal.

2. Whether the terms of appointment can prevail on the statutory provisions?

13. It is urged that as per terms of appointment, service of the respondent was terminable by giving three months' notice. The petitioner while issuing order 25.8.2009, offered three months' notice pay. It was even to settle the dispute on a complaint filed by respondent employee. I find that terms and conditions between the parties cannot take away the rigor of statutory provisions. Section 28-A mandates dismissal for reasonable cause and by serving one month's prior notice or pay in lieu thereof.

14. Perusal of the order dated 25.8.2009 itself reveals dismissal of service since

7th July, 2009. On the aforesaid date, neither one month's notice or wages in lieu thereof was offered to the employee nor reasonable cause was given. In view of the above the dismissal of service w.e.f. 7.7.2009 become in violation of provisions of Section 28-A of the Act, because requirement of one month's notice is prior to dismissal and not subsequent to it. It is not that respondent employee was dismissed from service w.e.f. 25.8.2009 but dismissal is w.e.f. 7.7.2009. Hence, action was in violation of Section 28-A of the Act. Accordingly, finding recorded by the authority is just and proper, rather it is in conformity with provisions of Section 28-A of the Act of 1958.

3) Whether validity of order dated 25.7.2009 has not been adjudicated by the authority concerned.

15. I find that the order aforesaid has been noticed by the authority and if the entire discussion is taken note of then termination w.e.f. 7.7.2009 vide order date 25.8.2009 was scrutinized and determined by the authority concerned. In the concluding paras, reference of order dated 25th August, 2009 has been given by the authority and in any case, I find that order dated 25th August, 2009 was in violation of provisions of Section 28-A of the Act for the reasons given above and by the authority concerned.

4) Whether the authority concerned was justified to order reinstatement?

16. According to the learned counsel for petitioner, direction for compensation could have been given as discretion lies to order reinstatement or award compensation or both. I find no illegality in passing order of reinstatement. The discretion lies with the authority to pass appropriate order and it can be interfered only when the order is vitiated by error of law apparent on the face of record or discretion was not exercised judicially. The case in hand is not of that nature. Learned counsel could not give reason as to why a direction for compensation alone should have been given. Accordingly, even the arguments in reference to sub-sections (3) and (4) of Section 28(A) cannot be accepted.

5) It is lastly urged that respondent employee failed to show unemployment during intervening period so as to grant consequential benefit of back wages on reinstatement.

17. Reference of the judgment of Division Bench in the case of Ramesh Kumar (supra) has been given. Therein issue was decided in a writ petition where parties cannot lead evidence. I do not find an argument before the authority to deny back wages. The petitioner have taken aforesaid plea for the first time before this Court only. The consequence of setting aside termination is to allow benefit arising out of it unless denied. Accordingly, even the last argument raised by counsel for petitioner cannot be accepted.

18. In view of aforesaid, I find no apparent error in the impugned order and looking to the limited jurisdiction of this Court under Article 226 of the Constitution of India. The judgment of the Hon'ble Apex Court in the case of

Sadhana Lodh Vs. National Insurance Company Ltd. and Another, is referred for the aforesaid. Para Nos. 7 and 8 of the judgment are quoted hereunder for ready reference:--

7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution of India is confined only to see whether an inferior Court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate Court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or tribunal purports to have passed the order or to correct errors of law in the decision.

For the aforesaid reasons, we are of the view that since the insurer has a remedy by filing an appeal before the High Court, the High Court ought not to have entertained the petition under Articles 226/227 of the Constitution and for that reason, the judgment and order under challenge deserves to be set aside. We, accordingly, set aside the judgment and order under appeal. The appeal is allowed. There shall be no order as to costs. However, it would be open to the insurer to file an appeal if it is permissible under the law.

In view of discussions made above and in the light of the judgment of Hon''ble Supreme Court in the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, , I do not find any merit in this writ petition. The same is accordingly dismissed.

This disposes the stay application also.