

(2013) 09 RAJ CK 0143

In the Rajasthan High Court

Case No : Civil Special Appeal (Writs) No. 1571 of 2012

Cox and Kings Limited

APPELLANT

Vs

Shri Narendra Singh Rathore and Another

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Rajasthan Shops and Commercial Establishments Act, 1958 — Section 28A

Citation : (2013) 09 RAJ CK 0143

Hon'ble Judges : Amitava Roy, C.J.;Veerendr Singh Siradhana, J

Bench : Division Bench

Advocate : Vinendra Agarwal, for the Appellant; N.K. Singhal, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, C.J.—Being aggrieved by the judgment and order dated 17.8.2012 rejecting its challenge to the order dated 28.3.2011 passed by the Prescribed Authority, Rajasthan Shops and Commercial Establishment, Jaipur City, Jaipur qua the respondent No. 1 herein, the appellant/writ petition, who is the employer within the meaning of the Rajasthan Shops and Commercial Establishments Act, 1958 (for short, hereafter referred to as "the Act"), is in appeal for redress. We have heard Mr. Virendra Agarwal, learned counsel for the appellant and Mr. N.K. Singhal, learned counsel for the respondent No. 1.

2. The pleaded facts, at the outset, would be necessary to outline the rival orientations. The appellant invoked the writ jurisdiction of this Court contending that it is a public limited company registered under the Companies Act, 1956. The respondent No. 1 was provided appointment by it as a probationer on 1.5.1996, whereafter on 1.1.1997, he was recruited as Junior Executive Accountant. According to it, with time, he became wayward, and eventually, stopped coming to the office on and from 7.7.2009, and thereafter on 25.8.2009 vide a letter of the even date to that effect, his services were terminated with effect from the date of his absence i.e. 7.7.2009. Three months' salary in lieu of

the notice period alongwith outstanding dues towards full and final settlement were offered to him by two cheques.

3. The respondent No. 1 however prior thereto in July 2009, filed a petition u/s 28-A of the Act, in which he concealed his default in coming to the office on and from 7.7.2009 and also the terms and conditions of the letter of his appointment dated 10.7.2002, which inter alia contained a clause permitting termination of his appointment by a three months' advance notice or salary in lieu thereof, and that, he had accepted the same without any reservation. While repudiating the allegations made in the petition submitted by the respondent No. 1 before the Prescribed Authority to be unfounded and frivolous, the appellant/writ petitioner contended that before it could file its reply, the respondent No. 1 sought an amendment of his petition seeking to challenge the letter of termination dated 25.8.2009, which was allowed. The learned Prescribed Authority eventually, at the conclusion of the proceedings in which the parties had adduced oral evidence, rendered its decision on 28.3.2011 with a direction to the appellant/writ petitioner to regularize the service/absence period, reinstate him and release all outstanding dues. Contending that Section 28-A of the Act and Rule 24-B of the Rajasthan Shops & Commercial Establishment Rules, 1959 (for short, hereafter referred to as "the Rules"), had been wrongly interpreted and applied in the facts and circumstances of the case, the challenge was laid.

4. The respondent No. 1, in his reply while claiming that he was appointed as Junior Executive Accountant with the appellant/writ petitioner on 1.5.1996, and that, thereafter, he was confirmed in that post on 1.1.1997, stoutly denied the allegation that he gradually became wayward. He asserted that he discharged his duty sincerely, honestly and diligently and denied the allegation that he stopped coming to the office from 7.7.2009. On the other hand, he imputed that on 4.7.2009, the charge of his office was taken away from him and on 7.7.2009, he was verbally terminated from service without citing any reason therefor. According to him, it was thereafter that on 20.7.2009, he filed the petition before the Prescribed Authority under the Act seeking its remedial intervention, whereupon notices were issued to the appellant/writ petitioner. The respondent No. 1 averred that on receipt of such notice, the appellant/writ petitioner arranged for its representation before the Prescribed Authority on 27.8.2009. Prior thereto however, by order dated 25.8.2009 his services were terminated with effect from 7.7.2009. While contending that no such decision could have been taken terminating his service in the manner done without holding any enquiry or affording any opportunity to him, the answering respondent further asserted that his ouster as devised with retrospective effect, was clearly invalid in law. Further, the decision dated 25.8.2009 during the pendency of proceedings before the Prescribed Authority was also non est.

5. The parties adduced oral and documentary evidence before the Prescribed Authority, which by its order dated 28.3.2011, concluded that the appellant/writ petitioner had not complied with the requisites of Section 28-A, and that, there

was no justifiable reason to terminate the services of the respondent No. 1. It was ordered u/s 28-A(3) that the continuity of service of the respondent No. 1 be maintained, he be reinstated and his outstanding pay and other dues for the intervening period alongwith all consequential benefits be released to him within a period of 30 days.

6. The learned Single Judge on the basis of the pleadings of the parties, formulated four points for determination, which are paraphrased as hereunder:-

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 is permissible even in case of oral termination?

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

3. Whether the validity of the order dated 25.8.2009 had been adjudicated by the Prescribed Authority?

4. Whether the Prescribed Authority was justified to order reinstatement?

7. On a conjoint reading of Section 28-A and Rule 24-B, it was held that an application before the Prescribed Authority was maintainable qua oral termination. It was held further that the terms of appointment cannot supersede the statutory provisions. The answer to the remaining two questions were also in the affirmative. It was determined that the order dated 25.8.2009 was in violation of the provisions of Section 28-A of the Act, and that, there was no illegality in the direction for reinstatement of the respondent No. 1, with all consequential benefits, in service.

8. Mr. Agarwal has insistently argued that as under the scheme of the Act and the Rules framed thereunder, no oral termination of the services of an employee is contemplated, the proceeding initiated prior to the letter dated 25.8.2009 is ab initio a nullity. According to the learned counsel, the prayer for amendment was thus apparently misconceived. As by order dated 7.4.2010, the prayer for amendment had been allowed, the time prescribed for initiating such a proceeding u/s 28-A having lapsed, meanwhile, the Prescribed Authority ought to have declared the same to be non est. While impeaching the decision of the Prescribed Authority directing continuity of service of the respondent No. 1, his reinstatement and release of all consequential benefits, as patently unsustainable in law and on facts, Mr. Agarwal has urged that by no means, the mandate of Section 28-A could have been either disregarded or avoided. He urged that as the proceedings initiated by the respondent No. 1 is clearly repugnant to the prescriptions of Section 28-A, the learned Single Judge ought to have declared the same to be null and void. The learned counsel has urged that the parties could not have contracted the applicability of Section 28-A and Rule 24-B. Mr. Agarwal took pains to underline that the Act was a special legislation, and that, having regard to the conscious configuration of Section 28-A and Rule 24-B, no departure therefrom, as made, is permissible. Apart from contending that the

respondent No. 1 had other alternative remedies, amongst others, under the Industrial Disputes Act, 1947, learned counsel insisted that in absence of any material on record that the respondent No. 1 had not been gainfully employed in the interregnum, the direction for continuity in service and release of consequential benefits is patently illegal and unsustainable. As the Act does not contemplate back wages but only compensation, the direction contra thereto as made by the learned Prescribed Authority, ought to have been interfered with in the writ proceedings, he urged. He has argued further that in the attendant facts and circumstances, the written order of termination dated 25.8.2009 with effect from 7.7.2009 is valid. To buttress his contentions, learned counsel placed reliance on the decisions of the Apex Court in *R. Jeevaratnam Vs. The State of Madras*, *The Gujarat Mineral Development Corporation Vs. Shri P.H. Brahmbhatt, Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another*, as well as in *Raptakos Brett and Co. Ltd. Vs. B.B. Harsha and Others*, and *A.P. Steel Wood Industries Cooperative Society Ltd. Vs. Labour Court & Anr.*, 1987-II LLJ 66.

9. Per contra Mr. Singhal has argued that no notice as contemplated u/s 28-A of the Act having been admittedly issued before terminating the services of respondent No. 1, the inviolable mandate of that legal provision has been contravened. Reiterating the pleaded stand of the respondent No. 1 that he had been verbally terminated on and from 7.7.2009, the learned counsel has insisted that the written order dated 25.8.2009 is only a desperate attempt to rectify the otherwise illegal and unfair act of the employer. The application for amendment in view thereof having been entertained and allowed by the learned Prescribed Authority, no plea against the maintainability of the proceedings ought to be entertained at this belated stage, moreso in absence of any challenge thereto at any earlier point of time, he insisted. Mr. Singhal argued that in the facts and circumstances of the case, having regard to the pleadings and the evidence on record authenticating that the services of the respondent No. 1 had been verbally terminated on and from 7.7.2009, no interference with the impugned judgment and order is called for. Mr. Singhal placed reliance on the decision of this Court in *Hotel Malwa Vs. Prescribed Authority and Others*,

10. The rival pleadings alongwith the documents therewith as well as the arguments based thereon have received our due consideration. Some admitted facts need be recapitulated. The respondent, who was initially appointed as a probationer with the appellant on 1.5.1996, was recruited as Junior Executive Accountant with effect from 1.1.1997 and became Senior Executive (Accounts) on 1.6.2003. The appointment letter dated 10.7.2002, amongst others, contained a clause permitting termination of services on three months' notice or salary for that period, in the alternative.

11. Whereas the respondent contend that he discharged his duties with due diligence and to the best of his abilities, and that, on 4.7.2009, the charge of his office was taken away from him and on 7.7.2009, he was verbally asked to keep

away from the duties, according to the appellant, he voluntarily stayed away from the office on and from that date i.e. 7.7.2009, and eventually, by a written order dated 25.8.2009, his services were terminated with effect from that date, after paying all his dues with three months' notice period pay in terms of the letter dated 10.7.2002. Meanwhile on 20.7.2009, the respondent filed an application before the Prescribed Authority under the Act alleging illegal termination of his services in violation inter alia of Section 28-A of the Act. Notices were issued in the said proceedings and on receipt thereof, the written order of termination dated 25.8.2009 was passed by the appellant.

12. As the rival orientations pivot around Section 28-A & 28-B of the Act, expedient it would be to extract these provisions for ready reference as hereunder:-

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 denied 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 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 of 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 both on the employer and the employee.

28-B. Notice of termination of employment by employee:-

(1) No employee who has been in continuous employment of an employer for a period of not less than six months shall leave the service of such employer without giving him one month's notice in writing.

(2) Where an employee contravenes the provision of subsection (1), his employer may forfeit his unpaid wages for a period not exceeding one month or for the number of days by which the notice falls short of one month or he may apply to the prescribed authority appointed u/s 28-A for awarding suitable money compensation against such an employee.

13. Noticeably, Sections 28-A & 28-B are lodged under Chapter VI-A inserted by Section 2 of Rajasthan Act No. 2 of 1972, published in Rajasthan Gazette, Extraordinary, Part IV-A dated 17.3.1972 and is titled "Dismissal, Discharge & Termination of Service". Whereas Section 28-A deals with the manner in which dismissal or discharge of an employee by an employer is mandated, Section 28-B makes it incumbent on the employee as comprehended therein to serve a notice in writing for termination of employment from his end.

Section 28-A presents the following salient features:-

(a) An employee who is in the employment of the employer continuously for a period of not less than 6 months cannot be dismissal or discharged, except for a reasonable cause.

(b) 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.

(c) The notice otherwise required shall not be necessary when the services of such employee are dispensed with for such misconduct as may be defined in the rules made by the State Government; and supported by satisfactory evidence recorded at an enquiry held for the purpose in the prescribed manner.

(d) Every employee so dismissed or discharged may make a complaint in writing in the prescribed manner to the Prescribed Authority within 30 days of the order of dismissal or discharge on the grounds, as enumerated therein.

(e) The Prescribed Authority may condone the delay in filing such a complaint, if it is satisfied that there was sufficient cause for not making the complaint within the prescribed time.

(f) The Prescribed Authority would cause a notice to be served on the employer, record briefly the evidence produced by the parties, make such enquiry, as it may consider necessary and pass orders in writing supported by reasons.

(g) The Prescribed Authority has power to give relief to the employee by way of reinstatement or by awarding money compensation or by both.

(h) The decision would be final and binding on the employer and the employee.

14. Rule 24-B(1) as would be relevant for the present adjudication, reiterates that the employee aggrieved by an order of dismissal or discharge under sub-section (1) of Section 28-A, may file a complaint to the prescribed authority either himself or through an agent within thirty days from the date on which the order of dismissal or discharge has been communicated to him in writing by his employer.

15. Both Section 28-A and Rule 24-B make it apparent that the dismissal or discharge contemplated therein has to be in writing, subject however to the compliance of the pre-emptory prerequisites, as statutorily stipulated. That either a reasonable cause or misconduct is an indispensable essentiality for enabling the employer to invoke the power u/s 28-A is writ large on the face of that provision. Whereas in the first eventuality, one month's prior notice or payment of wages in lieu thereof is a condition precedent, it is not so, if the services of the employee are proposed to be dispensed with for any misconduct, however, supported by satisfactory evidence recorded in an enquiry held for the purpose in the prescribed manner. In other words, in absence of either a reasonable cause or a proved misconduct, dismissal or discharge of the employee u/s 28-A cannot permissibly ensue.

16. A plain perusal of the complaint laid by the respondent to the Prescribed Authority on 20.7.2009 and the amended version thereof, reveal the consistent assertion that on 4.7.2009 he was relieved of the charge of his office, and on and from 7.7.2009, he was verbally asked not to render any service. He has asserted as well that prior thereto, he was neither given any notice nor any explanation was sought for from him indicating the reason in support of such an action. That no wages in lieu of such notice was offered or released, was underlined as well. He also averred that prior to the order dated 25.8.2009 terminating his services with effect from 7.7.2009, no notice of any kind, enquiry or opportunity of hearing to him had been afforded vis-?-vis the reason or the cause justifying such an action. That his wages and other emoluments from the month of June 2009 had not been released, was also stated.

17. Significantly, neither in the letter dated 25.8.2009 nor in the reply filed by the appellant before the Prescribed Authority, any reason had been cited in support of the termination of the services of the respondent with effect from 7.7.2009. Except recording the sweeping denial of the imputations made in the complaint, and contending that, alongwith the written order of termination of his services, three months' wages in lieu of notice had been offered, no further elaboration was made. To be specific, no plea was taken that the respondent had, of his own, discontinued to attend his duties on and from 7.7.2009, or that, he was otherwise found guilty of any misconduct proved in an enquiry held for the purpose in the prescribed manner and supported by satisfactory evidence, as obligated by Section 28-A.

18. The respondent in his testimony before the Prescribed Authority, reiterated the assertions in his complaint and did categorically depose that his services were terminated on and from 7.7.2009 verbally without complying with the mandatory requirements of Section 28-A. The witness examined on behalf of the appellant i.e. Manish Dave though denied the imputation that the respondent had been verbally terminated from the service and did state that he was absent from 7.7.2009, he admitted in the cross-examination, that no prior notice, charge-sheet or any explanation was sought for from him, and that, no departmental enquiry was also conducted in connection therewith. Abiding by the pleaded stand of the appellant, the witness stated that by order dated 25.8.2009, the respondent's services were terminated with effect from 7.7.2009. With reference to the records of the appellant, he conceded further that there was no order terminating the services of the respondent on and from 7.7.2009.

19. In absence of any pleaded stand of the appellant that the respondent had voluntarily abstained from duties on and from 7.7.2009, and that accordingly, his services were terminated on and from that date, the evidence to this effect is inadmissible and cannot be taken cognizance of. On the face of the records thus, on a consideration of the entire gamut of the pleadings and the evidence of the parties, no reasonable cause and/or misconduct as is envisaged in Section 28-A of the Act and enjoined to be an inflexible prerequisite for an action thereunder, is decipherable. As a corollary, the termination of the respondent's services with effect from 7.7.2009 is a nullity.

20. Vis-?-vis the plea against maintainability of the proceedings initiated before the Prescribed Authority on 20.7.2009 in absence, till then, of any written order of termination of the services of the respondent, suffice it to mention that as admittedly and eventually, the termination of the services did take effect from 7.7.2009, in the singular facts and circumstances of the case, such a demur cannot be sustained. Even otherwise, having regard to the underlying objective of the legislation i.e. to regulate the condition of work and employment in shops and commercial establishments, a purposive interpretation has to be extended to Section 28-A and Rule 24-B. The failure/omission of an employer to comply with the statutory enjoinder of a written order to effect the dismissal or discharge of an employee notwithstanding, if for all practical purposes, the employee is ousted from service by the employer's verbal fiat, it would amount to denying him the relief otherwise contemplated in law, for no fault of his. This would not only render Section 28-A unrealistic, but also would have the potential of laying undue and warranted premium of failure of the employer, which at times, may be deliberate to comply with the mandatory legislative imperatives.

21. Whereas there cannot be any manner of doubt that the dismissal or discharge of the employment of an employee u/s 28-A, has to be irrefutably by an order in writing to have the effect in law, to debar such an employee from filing a complaint before the Prescribed Authority under all circumstances, in absence of such an order would frustrate the very purpose of the enactment. As

in the present case, the services of the respondent were terminated with retrospective effect by an order in writing dated 25.8.2009, having regard to his imputation that he in fact had been arbitrarily, by a show of authority, prevented from discharging his duties on and from 7.7.2009, in absence of any material on record establishing either any reasonable cause or a proved misconduct against him, this plea of the appellant, if sustained, would render the protection accorded by the statute Section 28-A, wholly illusory. The fact that even by the order dated 25.8.2009, the services of the respondent were terminated with effect from 7.7.2009, is even highly significant and suggestive of the authenticity of the imputation of verbal termination of the services of the respondent on and from that date. The proceedings initiated before the Prescribed Authority on 20.7.2009 thus, cannot be held to be non est.

22. In this view of the matter, the amendment to the application dated 20.7.2009 on the receipt of the order dated 25.8.2009 on 7.4.2010, cannot be adjudged to be invalid. The amendment having been permitted and made in a subsisting proceedings and further in absence of any challenge to the order dated 7.4.2010 to this effect in any forum at any earlier point of time, the plea of bar of limitation also does not commend for acceptance. The decision of the Apex Court in Vishambhar & Ors. (supra) is clearly distinguishable and does not advance the case of the appellant. The cause for amendment of the application having admittedly arisen after the same was filed on 20.7.2009, no analogy can be drawn from this authority.

23. The decision dated 28.3.2011 of the Prescribed Authority in clear terms reveals that it had inter alia concluded that no reasonable cause for terminating the respondent's services with effect from 7.7.2009 had been proved and neither one month's prior notice nor wages in lieu thereof had been given to the respondent before terminating his services with effect from 7.7.2009.

24. The decision in Raptakos Brett and Co. Ltd. (supra) is also distinguishable as the pleaded case of the employer therein was that there was a reasonable cause for termination of the services of the employee as his performance was far from satisfactory. This contention was sought to be reinforced by citing various acts of commission or omission on his part.

25. The decision in A.P. Steel Wood Industries Cooperative Society Ltd. (supra) also does not clinch the plea of alternative remedy under the Industrial Disputes Act, 1947, the same having been observed to be one in addition to the succour provided by the Andhra Pradesh Shops and Establishments Act, 1966, as involved therein.

26. In R. Jeevaratnam (supra), the appellant therein at the relevant time, held the post of Deputy Tehsildar in the Revenue Department of the Government of Madras. Disciplinary proceedings were started against him and he was placed under suspension on 20.5.1949. The Disciplinary Proceedings Tribunal submitted its report on the conclusion of the proceedings, to the effect that the charges

against him had been proved and recommended his dismissal. The government thereafter issued notice to him asking him to show cause why he should not be dismissed from service, and on a consideration of the written representation that he made, by order dated 17.10.1950, he was dismissed with effect from 20.5.1949. Responding to the impeachment of such retrospective dismissal, the Hon"ble Apex Court on interpreting the order dated 17.10.1950 held that in substance, the order directed that (1) the appellant be dismissed, and (2) the dismissal be operative retrospectively from 20.5.1949. Their Lordships held that the two parts of the composite order were separable, the first part as a dismissal on and from 17.10.1950, and that, the second part according retrospective effect thereto, in case it was invalid, did not affect the first part. The order of dismissal as from 17.10.1950 was held to be valid and effective. Having regard to the sequence of events that is discernible in the textual facts of this decision, the proposition based thereon, in our view, is inapplicable in the case in hand. No such notice or enquiry was either issued or made, citing any cause relatable to the ultimate termination of the services of the respondent with effect from 7.7.2009. It was by one stroke on 25.8.2009 that the termination was given effect to on and from 7.7.2009 without indicating any foundation therefor. The order dated 25.8.2009 is thus, a composite and inseparable one. Even otherwise, the termination of services of the respondent on and from 25.8.2009 cannot be sustained, in view of the apparent contravention of Section 28-A of the Act.

27. To reiterate, there is neither any reasonable cause disclosed and proved by the appellant nor any misconduct by him has been alleged and established. The offer of three months' notice pay and other financial releases, by no means, did absolve the appellant of its statutory duty to comply with the inalienable and sacrosanct prerequisites for a valid dismissal or discharge of an employee u/s 28-A.

28. We are in respectful agreement with the ultimate conclusions recorded by the Prescribed Authority and the learned Single Judge. Reinstatement having been rightly ordered, consequential benefits are a lawful corollary thereof. The reservation that compensation was the legally contemplated relief in lieu of the direction for payment of wages/salary and other financial benefits thus, does not merit acceptance. We see no reason to interfere. The appeal fails and is dismissed. The stay application also stands rejected. No costs.