
(2002) 08 SHI CK 0017
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 941 of 1992

Joginder Kumar Gautam and Another	APPELLANT
Vs	
State Bank of India and Others	RESPONDENT

Date of Decision : 05-08-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 25

Citation : (2003) 2 LLJ 401

Hon'ble Judges : Kuldip Chand Sood, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Inder Singh and Vijay Thakur, for the Appellant; K.D. Sood, for the Respondent

Final Decision : Dismissed

Judgement

Kamlesh Sharma, J.—The petitioners are presently working as cashiers with the State Bank of India, Sundernagar Branch, Sundernagar, District Mandi. In the present writ petition they have assailed the order dated November 18, 1992 (Annexure O) and prayed for the following reliefs:

- (a) That it may be held that the petitioners are permanent cashiers and they cannot be termed as temporary cashiers by and rule, or law or any contract and, as such, their services cannot be terminated.
- (b) That the notice contained in Annexure PO and the intended notice to petitioner No. 2 are wrong and illegal and against the provisions of Section 25-F of the Industrial Disputes Act.
- (c) That the respondents may be restrained from terminating the services of the petitioners.

2. It is stated in the writ petition that the petitioners were appointed as cashiers on March 26, 1971 and September 14, 1971 respectively with the respondent-Bank at Sundernagar branch as per the Rules and after holding the requisite test.

After their appointment, the petitioners continued working as cashiers to the satisfaction of their superiors. They appeared in the test conducted for the posts of clerks in the month of March 1972, but failed. They again appeared in the examination conducted in October 1972, but could not succeed. After their appearance in the examination and before the declaration of the results, the Branch Manager of the respondent-bank asked them to sign a proforma, copy whereof is on record as Annexure-A, which they refused to sign on the apprehension that their service conditions may not be changed and they may not be considered temporary. On this, respondent No. 2 got annoyed and started finding fault with their working on one pretext or the other. Ultimately, vide order dated February 26, 1973, the services of the petitioners were terminated w.e.f. February 26, 1973 on the ground that they could not qualify in the test for recruitment of permanent cashiers.

3. According to the petitioners, since they were permanent their not passing the test and also not signing the pro-forma Annexure- A are of no consequence. They represented, but with no results and they were compelled to file CWP No. 185 of 1973 which was dismissed by judgment dated November 16, 1981 passed by the learned single Judge of this Court, inter alia, holding that the petitioners being workmen had an alternative efficacious remedy under the Act, hence their writ petition was not maintainable.

4. Feeling aggrieved the petitioners filed Letters Patent Appeal No. 43 of 1981 which was allowed on July 31, 1990 and the order of the learned single Judge was set aside holding that having found that there was non-compliance of the provisions of Section 25-F of the Act, the learned single Judge was not right in not granting relief to the petitioners. Accordingly, the termination of the services of the petitioners was held void ab initio and inoperative and a declaration was made that they continued to be in service as cashiers with all consequential benefits, namely, back wages in full with other benefits, if any, in accordance with law. The respondents challenged the judgment dated July 31, 1990 of the Division Bench by filing a SLP in the Supreme Court which was dismissed vide order dated February 19, 1991 Annexure-N to the writ petition. When the reliefs granted to the petitioners vide judgment dated July 31, 1990 passed by the Division Bench were not granted to the petitioners, they filed Contempt Petition (Civil) No. 49 of 1990 which was later on withdrawn after the petitioners were reinstated. Thereafter, the petitioners were asked to appear in the test on May 3, 1992 for their permanent absorption in the bank as cashiers, but they did not avail the chance and ultimately notice dated November 18, 1992, Annexure-O u/s 25-F of the Act was given to petitioner No. 1 that on the expiry of one month from the receipt of the said letter, his services will stand retrenched. It is further stated in this letter that retrenchment compensation will be paid to the petitioner No. 1 by means of a banker's cheque in due course. Before similar letter could be issued to petitioner No. 2 both the petitioners filed the present writ petition.

5. This writ petition came before the Division Bench on December 8, 1992 when

ad interim restraint order was issued against the respondents not to terminate the services of the petitioners. Later, on April 26, 1994 the writ petition was admitted and the ad interim order dated December 8, 1992 was confirmed.

6. The respondents have filed reply on the affidavit of Mr. A.K. Kaushal, the then Branch Manager of State Bank of India, Sundernagar Branch, District Mandi. In their preliminary submissions, it is stated that the petitioners were appointed as temporary cashiers and they have been working as such. They are not the permanent employees of the bank as they were appointed by the Branch Manager only whereas the permanent employees can only be appointed by the Branch Manager with the prior sanction and approval of the Regional Manager. It is also stated that the employees appointed on temporary basis are made permanent only if they qualify in the examination of the bank.

7. It is admitted that the petitioners were not issued appointment letters when they were appointed as temporary employees. But the fact that they were appointed on temporary basis is borne out from the records of the bank, the extracts whereof are placed on record as Annexures R-1 to R-6. The petitioners themselves have admitted the fact that they were employed as temporary cashiers in their applications Annexures R- 7 and R-8 which they had submitted to the bank. Having failed to qualify the requisite test, the petitioners have no right to the post held by them and they have rightly been retrenched after giving them one month's notice in accordance with law. For regularisation or for coming on permanent establishment, the temporary employees like the petitioners, are required to pass the requisite test, otherwise there will be back door entry and those who have joined the bank after undergoing the rigours of the test and interview, will be discriminated.

8. On merits, it is specifically denied that the petitioners were appointed as temporary cashiers after passing the test and fulfilling other conditions. They were initially appointed for a period of one month which was extended from time to time as per the requirements of the bank. It is not admitted that the service record of the petitioners is clean as alleged because no service sheets or records are maintained in respect of them being temporary employees. Even otherwise, it would not improve their status. Being temporary employees they have not been enjoying the benefits and privileges given to the permanent employees. In paragraph 5 of the reply it is specifically stated that the petitioners were appointed as temporary cashiers and they could not be made permanent or regularised as they had failed to pass the requisite written test. It is pointed out that all the permanent appointments in the bank are made on the basis of written test and interview.

9. According to the respondents, the petitioners having failed in the requisite test twice have rightly been retrenched and there is no violation of the provisions of Section 25-F of the Act. The chances of promotion for clerks and cashier are the same, as for both categories the candidates must pass the test before they can be made permanent. It is denied that the bank wanted to change the service

conditions of the petitioners and they got annoyed on them on their refusal to sign the proformas. The pro formas given to the temporary employees were standard letters and the refusal of the petitioners to sign the same would not change their position. It is reiterated that the services of the petitioners have been terminated by following the procedure under the Act by giving them one month's notice and retrenchment compensation, but before the retrenchment order could take effect and the retrenchment compensation could be paid, the petitioners filed this writ petition and obtained the stay order. It is further stated that the order of termination of the services of the petitioners is legal and valid and not by way of punishment. There is no violation of the principles of natural justice as there was no question of affording them an opportunity before passing the order of their retrenchment when they even failed to avail the special chance to qualify the test on May 3, 1992 especially arranged for them. Copies of the orders directing the petitioners to appear in the special test are placed on record as Annexures R- 12 and R-13.

10. The filing of CWP No. 185 of 1973 and the judgments passed by the learned single Judge and thereafter by the Division Bench and the order passed in SLP by Supreme Court are not denied. According to the respondents, the contempt petition was filed by the petitioners with a view to pressurise the respondents to agree to their unreasonable demands to absorb them as permanent cashiers which was ultimately withdrawn by them.

11. The petitioners have filed rejoinder reiterating the averments made in the writ petition and denying the contrary stated in the reply-affidavit.

12. We have heard the learned counsel for the parties and gone through the record.

13. It is not in dispute that the services of the petitioners have been terminated u/s 25-F of the Act by giving them one month's notice. As regards the retrenchment compensation, it was stated in the notice that it will be paid to the petitioners by means of banker's cheque in due course, but before the expiry of the period of notice of one month, the petitioners filed this writ petition and obtained stay order on December 8, 1992, hence the retrenchment compensation could not be paid. On the facts on record, the controversy is in the narrow compass. It is:

Whether the petitioners are temporary employees and for bringing them on permanent establishment, they were required to pass the test, failing which they are liable to be terminated by following the procedure laid down u/s 25-F of the Act? If yes, whether the said procedure has been followed or not?

14. The petitioners have claimed that they were appointed on regular basis against the permanent posts of cashiers and there was no condition that they were to pass a test to become permanent cashiers, but they have not been able to substantiate it by placing any document on record. Admittedly, no appointment letter was issued to the petitioners at the time of their appointment

by the Branch Manager of the respondent-bank. From the documents placed on record by the respondents, it is clear that they have been treated as temporary cashiers and for bringing them on permanent establishment, they were asked to qualify in the written test in which either they did not appear or if appeared, they did not qualify. Having appeared in the test but being unable to qualify it does not lie in the mouth of the petitioners that they are not required to appear in the test for becoming permanent cashiers. Their submission that they appeared in the test for their appointment in the cadre of clerks, is without any substance as they were asked to appear in the test for becoming permanent cashiers and not for bringing them in the cadre of clerks.

15. Therefore, from the material on record, it is clear that the status of the petitioners is that of temporary cashiers. Though in the earlier writ petition, the petitioners had claimed that they are permanent cashiers of the bank, but this point was not adjudicated upon and the termination order impugned in the said writ petition was set aside for non-compliance of the provisions of Section 25-F of the Act. Above all, we are unable to comprehend how could the petitioners be appointed as permanent cashiers by the Branch Manager without holding any test or interview and without even issuing appointment letter to them. The stand of the respondents appears to be right that the Branch Manager had initially appointed them for a short period and thereafter gave them extension from time to time looking to the work available in the Branch.

16. The respondents have placed on record the memorandum for the Central Board Recruitment to the Clerical Cadre which was circulated vide letter dated August 12, 1971 by the Managing Director of the respondent-bank. It is clear from this memorandum, that under the prevailing system of recruitment the selection to the post of clerk/ cashier used to be made by the Local Head Offices/ Regional Managers' Offices through specially constituted committees by holding written examination. Some modifications in the constitution of the selection committees for the purpose of interview and the type of written test were under contemplation but it is clear that no regular appointment used to be made without holding test and the interview. It was for this reason that the respondent-bank was insisting upon the petitioners to qualify in the test for their permanent absorption in the bank. We do not find anything wrong in it. The appointment of the petitioners as cashiers by the Branch Manager of the respondent- bank without their qualifying in the written test and interview and without appointment letters incorporating the terms and conditions of their appointment does not create any right in their favour to continue in service without qualifying in the test.

17. Learned counsel for the petitioners has urged that in the absence of any statutory rules or administrative instructions, the petitioners could not be asked to appear in the test and their services could not be terminated either on their failure to appear in the test or to qualify in the test. We do not find any substance in this submission. Rather in the absence of any statutory rule or

administrative instructions or even the appointment letter containing terms and conditions of the appointment for the continuation of the petitioners in the service and also for bringing them on permanent establishment, the respondent-employer is within its right to impose the condition of qualifying in the written test finding that their entry in the service of the bank was from back door without qualifying in the written examination and interview.

18. As held hereinabove, the respondents have been able to show that at the relevant time there was a system of recruitment under which regular appointments used to be made by selection by holding written test and interview and the case of the petitioners was an exception. On the other hand, the petitioners have not been able to point out even a single case in which any appointment was made like their appointment and the employee was permitted to continue in service and brought on permanent establishment without his qualifying in the test. In fact, the petitioners have been very lucky to continue in service since their appointment in the year 1971 without any right for the reason that their first termination was not found legal and valid for want of notice u/s 25-F of the Act and so far as the second termination is concerned, it could not be given effect to because it has been stayed by the order of this Court.

19. The petitioners have assailed the termination order Annexure-O whereby petitioner No. 1 was given one month's notice u/s 25-F of the Act for retrenching him from the service of the bank for the reason that he had failed to appear in the written test and interview specially arranged for him for bringing him on the permanent establishment of the respondent- bank. So far as the second petitioner Jagdish Kumar Bath is concerned, he had not received a similar notice and had joined petitioner No. 1 in this writ petition merely on the apprehension. But it is not in dispute that the services of petitioner No. 2 were also terminated by giving him similar notice u/s 25-F of the Act.

20. Learned counsel for the petitioners has tried to find fault with the notice on the ground that the retrenchment compensation was not paid to the petitioners along with the notice as provided u/s 25-F (b) of the Act. We do not find any substance in this submission. A reading of Section 25-F(b) of the Act makes it clear that the retrenchment compensation is payable at the time of retrenchment: whereas in the case in hand the retrenchment was yet to take place and only one month's notice was given on November 18, 1992 which was stayed on December 8, 1992 before expiry of the notice period of one month. In these circumstances, there was no occasion for the respondents to pay retrenchment compensation, though they had categorically mentioned in the notice that retrenchment compensation will be paid to petitioner No. 1 by means of banker's cheque in due course. This ground is available to the petitioners if they are in fact retrenched without being given retrenchment compensation.

21. Learned counsel for the petitioners has referred to the judgment of the Supreme Court in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, wherein the requirement of payment of compensation at the

time of retrenchment has been held a condition precedent for the retrenchment of a workman rendering the impugned retrenchment invalid for want of compliance of the said condition. But on the basis of this judgment it cannot be urged that the retrenchment compensation is required to be paid simultaneously with the notice u/s 25-F (a) of the Act. Similar view was taken by the Patna High Court-Ranchi Bench in Gangadhar Prasad v. State of Bihar 1986(53) FLR 209. Therefore, we do not find any infirmity in the impugned notice of termination of the services of the petitioners.

22. Since the respondents have not taken the preliminary objection regarding maintainability of the writ petition in their reply-affidavit, we have proceeded to consider the writ petition on merits. Otherwise also, in the facts and circumstances of this case, we are not agreeable to the preliminary objection raised by the learned counsel for the respondents that in view of the alternative remedy available to the petitioners under the Act, the present writ petition is not maintainable. The ratio of the judgments of the Supreme Court in *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, *Chandrakant Tukaram Nikam and Others Vs. Municipal Corporation of Ahmedabad and Another*, cited by the learned counsel for the respondents, is not applicable to the present case as in those judgments the learned Judges were considering the question whether the jurisdiction of the Civil Court to hear the matters falling within the ambit of industrial disputes under the Act is barred or not. So far the High Court is concerned as, the existence of an alternative remedy is not a bar for exercising the powers of judicial review under Article 226 of the Constitution of India and it is only a self-imposed restriction based on rule of prudence.

23. It is not in dispute that legality of the order of termination passed by the employer is an industrial dispute within the meaning of Section 2(k) of the Act and in the normal course it is referred to the Labour Court u/s 10 of the Act by the appropriate Government. No doubt the Act does provide an alternative remedy which is speedy and inexpensive and in the normal course powers under Article 226 of the Constitution of India may not be exercised merely to resolve the grievance of some wrongful dismissal, but in a given case depending upon its facts and circumstances and the issues involved, the Court may decide to bypass the statutory remedy. The case in hand falls in such category. Had this objection been raised at the time of admission of the writ petition, this Court would have decided it and directed the petitioners to raise the dispute under the Act. But after admitting the writ petition and keeping it pending for the last 10 years, it will not be fair and just to dismiss the writ petition on the ground that an alternative remedy under the Act is available to the petitioners and they may raise the same under the Act. For taking this view, we have relied upon the judgment of Division Bench of this Court in *Jagbir Singh and Others Vs. State of H.P. and Others*, Moreover the present case does not involve disputed questions of fact which cannot be decided on the basis of affidavits filed by the parties.

24. The result of above discussion is that there is no merit in this petition and it is dismissed.