

**(1990) 07 SHI CK 0030**

**In the High Court Of Himachal Pradesh**

**Case No : Letters Patent Appeal No. 43 of 1981**

Joginder Kumar Gautam

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

**Date of Decision : 31-07-1990**

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Industrial Disputes Act, 1947 — Section 2, 25F

**Citation : (1990) 2 ILR HP 457**

**Hon'ble Judges : P.C.B. Menon, C.J.; Davinder Gupta, J**

**Bench : Division Bench**

**Advocate : Indar Singh, for the Appellant; K.D. Sood, for the Respondent**

**Final Decision : Allowed**

## Judgement

Devinder Gupta, J.—This Letters Patent Appeal has arisen against the judgment of the learned single Judge of this Court dated (sic), September 16, 1981, dismissing the Civil Writ Petition filed by the Appellants Petitioners.

2. Briefly stated, the facts are these: The Appellants herein were appointed as cashiers on March 26, 1971 and September 14, 1971, respectively, with the Respondent-bank at Sunder agar branch. According to the Appellants they were appointed as cashiers to permanent posts which were lying vacant at the relevant time. It was further stated that the Appellants tried their luck for improving chances of promotion by appearing in an examination conducted by the Respondents for the post of clerks in the month of March 1972 but could not succeed. Thereafter they again appeared in the examination conducted by the Respondents in October 1972 but in this attempt they again failed. In the month of October 1972, the Appellants were asked to sign a proforma (Annexure "A" to the writ petition) on the basis of which the Respondents wanted to get confirmed that the Appellants were temporary employees of the bank but the Appellants refused to sign the same. Upon this, the Respondents felt annoyed and began finding faults with them and ultimately terminated their services by serving upon

them two separate orders dated February 26, 1973, in which it was mentioned that despite affording opportunity to "hem to appear in the examination/test, they had failed to qualify the and, therefore, their

3. The orders of termination were challenged by the Appellants by filing a writ petition on the following grounds:

(a) The termination of the Petitioners from service is against the provisions of Himachal Pradesh Shops and Commercial Act, 1969;

The termination orders are bad and liable to be set aside under the provisions of the State Bank of India Act, 1955;

The termination orders are also liable to be set aside under the Industrial Employment (Standing Orders) Act, 1946; and The said termination orders are also violative of the provisions of the Industrial Disputes Act, 1947.

4. The Respondents contested the writ petition by raising preliminary objections as well as on merits. It was contended that the Appellants were holding temporary posts and as such the termination orders were legally valid and since the Petitioners had failed to qualify the test, which was a pre-requisite for being appointed as permanent cashiers, therefore, they had no right to claim that they were employed as permanent cashiers. In so far as the preliminary objections were concerned, it was contended that the writ petition was not a proper remedy for the Petitioners (Appellants) since they had an alternate remedy available under the provisions of the Industrial Disputes Act, 1947 (briefly the Act). The other preliminary objection raised was that the petition was bad for non-joinder of necessary party, namely, the Union of India, as their prayer for referring the industrial dispute for adjudication had been rejected by it.

5. The learned single Judge, by placing reliance upon the judgment of Supreme Court in Santosh Gupta Vs. State Bank of Patiala, concluded that the termination of the services of the Petitioners (Appellants) fell within the ambit of retrenchment as defined in Section 2(oo) of the Act and also that in view of the admitted facts, there was non-compliance of Section 25F of the Act but refused to grant any relief on two grounds, namely, that the writ petition for reinstatement or quashing the dismissal was not maintainable and such a dispute could only be agitated before the Industrial Tribunal under the provisions of the Act and further that the Appellants despite objection having been raised by the Respondents about the non-joinder of Union of India as party, who had passed the order refusing to refer the matter for adjudication to the Industrial Tribunal, had failed to remedy the defect and in the absence of non-joinder of necessary party no relief could be granted to the Petitioners (Appellants).

6. We have heard the learned Counsel for the parties. The contention of the learned Counsel for the Appellants is that in view of the findings recorded by the learned single Judge on admitted facts to the effect that the termination of the Appellants was retrenchment within the purview of Section 2(oo) of the Act and

there being noncompliance with the provisions of Section 25F, the writ petition ought to have been allowed by granting the relief's prayed for in the petition. The learned Counsel for the Respondents, on the other hand, contended that even if there was non-compliance of the provisions of Section 25-F of the Act, the remedy of the Appellants lay by approaching the Industrial Tribunal and not by filing a writ petition in this Court. It was further contended on behalf of the Respondents that the Appellants have not exhausted the remedy by approaching the competent authority for making a reference in accordance with law and even if at one stage the appropriate Government had declined to make a reference, nothing prevented them from approaching again the appropriate Government for making a reference.

7. We have given careful consideration to the arguments advanced by both the parties. In our view, the learned single Judge was not right in his view that the writ petition was not a proper remedy in the facts and circumstances of the case. Annexure "K" to the writ petition is a communication dated September 10, 1973, addressed by the Under Secretary to the Government of India, Ministry of Labour and Rehabilitation, Department of Labour and Employment, to the Regional Manager of the Respondent-bank and to the General Secretary, Delhi Circle State Bank Staff Association, New Delhi. It reads as under:

Subject-Industrial dispute between the management of State Bank of India and their workmen over alleged illegal termination of services of Sarvshri J.K. Gautam and J.K. Bali.

Sir

In continuation of this Ministry's letter No. L-12012/53/73/LRII dated the 9th May 1973 on the above subject I am directed to say that for permanent absorption in any cadre of the Bank's services, it is necessary to qualify in the written test/interview. Sarvshri J.K. Gautam and J.K. Bali were allowed to compete at the written test but they could not qualify. As such the action of the management in terminating their services does not appear to be mala fide. The Government of India, therefore, do not consider the dispute prima facie fit for reference to adjudication.

A bare persual of this communication would show that the Appellants had, in fact, sought a reference under the provisions of the Act and which had been declined. It does not lie in the mouth of the Respondents to contend that the Appellants ought to have again approached the appropriate Government with the same prayer. The Appellants in such circumstances were right in having invoked the jurisdiction of this Court for redressal of their grievance under Article 226 of the Constitution. Remedy of invoking the jurisdiction under Article 226 of the Constitution is not an alternate remedy. Even assuming that the Appellants had not availed the appropriate remedy for getting the matter referred for adjudication under the Act, nothing prevented them in approaching this Court from claiming the appropriate relief's. The existence of an alternate remedy is

no ground for refusing certiorari where on undisputed facts there is a violation of the principles of natural justice. This Court in *Tirath Raj, HPSEB Ridge (E) Sub Division and Ors. v. H.P. State Electricity Board and Ors.* 1989 (4) S.L.R.360 (ILR 1989 HP 639) while considering this aspect has, in para 55 of the report, observed:

The existence of an alternative remedy does not bar the jurisdiction of this Court under Article 226 of the Constitution. It is always a matter of discretion of the Court under Article 226 whether to relegate a party approaching it for redress to an alternative remedy available to it or not. The legal position is not in doubt. The question is whether the circumstances of the present case justify an order now in the year 1989 that the Petitioner should seek redress in industrial adjudication. We feel that it would not be fair to ask them to do so. The petition came before this Court in the year 1989. It has remained pending for all these years for no fault of the Petitioners. The matter had been taken to the Supreme Court also in connection with an interim order made by this Court in the month of May 1988. Asking the Petitioners now to approach industrial adjudication for redress and thus decline to go into the merits of the claim made by them in these proceedings, we feel, would not be a sound exercise of judicial discretion. Several decisions were brought to our notice on this aspect of the case. They do not lay down any rule of thumb that wherever an alternative remedy by way of industrial adjudication was available to the Petitioners, the High Court should decline to go into the merits. The decisions only say that it is a matter of discretion, based on the facts and circumstances of a particular case, for the High Court whether it would go into the merits of the claim brought before it under Article 226 or direct the Petitioner to seek redress by way of industrial adjudication. We will notice the decision cited before us without dealing with them individually. These decisions are: *Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others*, ; the *Gujarat State Co-operative Land Development Bank Ltd. Vs. P.R. Mankad and Others*, ; *Kirpa Shankar Dwivedi v. Industrial Tribunal and Ors.* 1982 LabIC (All) 973 *Manohar Lal v. State of Punjab and another* 1983 LabIC (P&H) 1783 1983 (2) S.L.R.658, *Bhanwar Lal and Ors. etc. v. Rajasthan State Road Transport Corporation and another* 1984 Lab.IC (Raj.) 1794 *Dinesh Prasad and Ors. v. State of Bihar and Ors.* 1985 Lab.IC (Pat) 287 S.L. *Soni v. Rajasthan State Mineral Development Corporation Ltd., Jaipur* 1986 Lab.IC (Raj.) 468 *Dhari Gram Panchayat Vs. Saurashtra Mazdoor Mahajan Sangh and Another*,

8. The learned single Judge while dealing with the effect of the applicability of the provisions of the Act has observed as follows:

In such a situation it was agreed that the provisions of the Act of 1947 are applicable to the parties. The learned Counsel for the Petitioners contended that the termination of the services of the Petitioners falls within the ambit of retrenchment as defined in Section 2(oo) of the Act of 1947, which reads as follows:

"(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include

(a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (c) termination of the service of a workman on the ground of continued ill-health."

The learned Counsel for the Respondents also conceded that in view of the definition in Section 2(oo) of the Act of 1947, the case of the Petitioners is that of retrenchment. This position was admitted by the learned Counsel for the Respondents in view of the Supreme Court judgment in Santosh Gupta Vs. State Bank of Patiala, Thus, in view of the admitted facts the provisions of Section 25F of the Act of 1947 had to be complied with before terminating the services of the Petitioners, and it is admitted that these provisions have not been followed in the instant case.

Having held the termination of the services of the Appellants to be retrenchment and having found that there was non-compliance with the provisions of Section 25F, the learned single Judge was not right in not granting the adequate relief to the Appellants. It is now a well settled principle of law that when there is non-compliance with the mandatory provisions of Section 25F of the Act, the retrenchment is void ab initio and inoperative.

9. The next question which arises for consideration is as to what relief the Appellants are entitled. The learned Counsel for the Respondents has argued that the Respondents had in their reply to the writ petition taken up a plea that the Appellants were only temporary employees and were thus entitled only to one month's salary, which the Respondents are even now prepared to pay and even if there is no compliance with the mandatory provisions of Section 25-F of the Act, the court should not grant the relief of reinstatement in service but to award compensation. This submission of the learned Counsel for the Respondents has also no force. The law is also well settled that if the termination of service is void ab initio and inoperative there is no question of granting, reinstatement because there is no cessation of service and a mere declaration follows that the employee continues to be in service with all consequential benefits [See Mohan Lal Vs. Management of Bharat Electronics Ltd.,

10. In the result, the appeal is accepted. The judgment of the learned single Judge is set aside and the writ petition is allowed. We hold that the termination of the services of the Appellants was void ab initio and inoperative and a declaration is made that they continue to be in service as cashiers with the Respondent-bank with all consequential benefits, namely, back wages in full with other benefits, if any, in accordance with law.

11. No costs.