

(1993) 08 KL CK 0012
In the High Court Of Kerala
Case No : W.A. No. 903 of 1992

Koodaranji Service Co. - Op. Bank

APPELLANT

Vs

M.M. Lissy and Others

RESPONDENT

Date of Decision : 29-08-1993

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(oo), 25F, 25H, 33C(2)

Citation : (1993) 2 KLJ 652

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : M.C. Sen, for the Appellant; Babu Thomas, for the Respondent

Final Decision : Allowed

Judgement

Sreedharan, J.—Appellant is Koodaranji Service Co-operative Bank Ltd., Koodaranji, Mukkom Kozhikode. First respondent, Smt. Lissy, was appointed in the Bank as a Clerk on daily wages on 2-3-1983. She continued to serve the Bank in that capacity upto 1-4-1989. Her services were terminated on the basis of the instructions issued by the higher authorities under the Co-operative Societies Act. Termination of her services gave rise to an industrial dispute. It was referred to the Labour Court, Kozhikode for adjudication. Labour Court entertained the same as I. D. 5/1991. After appreciating the evidence let in by the contesting parties, the Labour Court passed an award on 21-1-1992 directing the Bank to reinstate Smt. Lissy as a Clerk with backwages and continuity of service. Bank challenged that award in O. P. 10304/1992. A learned Single Judge dismissed that Original Petition by judgment dated 17-8-1992 taking the view that the termination of service of Smt. Lissy is retrenchment as defined under the Industrial Disputes Act, hereinafter referred to as "the Act ", since it does not fall within clauses (a), (b) and (c) of the definition in Section 2 (oo) of the Act. Bank questions the correctness of this decision. The short question that arises for consideration is whether the termination of service of Smt. Lissy will amount to retrenchment as defined in the Act. Section 2 (oo) of the Act is in the following

terms:-

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

(bb) termination of the service of the workman as a result of non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein: or

(c) termination of the service of a workman on the ground of continued ill-health.

All retrenchments will result in termination of service of a workman by the employer. But all terminations of service of a workman by the employer will not fall within the definition of retrenchment. What all categories of termination of service of a workman will come within the purview of retrenchment as defined under the Act? It must be the termination of the service of a workman by his employer. This shows that there must be a valid relationship of master and servant between the employer and the workman. If the workman was not properly appointed as per the rules or in violation of the provisions of the rules can there be a legal relationship of master and servant between that employer and the workman? If a workman was employed in an establishment by an authority which was not competent to make the appointment and there be a valid and legal relationship of master and servant between that establishment and the workman? If the post to which the workman was engaged was not one sanctioned by the rules governing the employment in an establishment can there be a valid and legal relationship of master and servant between that establishment and the workman? When there cannot be a valid and legal relationship of master and servant between the employer and the workman can the termination of service of that workman result in retrenchment?

2. A retrenched workman is entitled to re-employment in preference to others when the employer proposes to take into his employ any other person, as per the provisions contained in Section 25H of the Act. This shows that the termination of service of the workman should have been from a post to which he could have been continued. If the post is such that its continuance is not possible, then the termination of service of the workman from that post cannot amount to retrenchment as defined under the Act.

3. Section 80 of the Co-operative Societies Act enjoins the Government to fix the number and designation of officers and servants of the different classes of co-operative societies. In exercise of that power, Government framed Rules. Rule

188 of the Co-operative Societies Rules, dealing with staff pattern, mandates that every society shall adopt the staff pattern indicated in Appendix III to the Rules. As per that provision, where any society is in need of any change in the pattern of staff, society must get prior approval of the Registrar of Co-operative Societies for effecting the change. As per Appendix III attached to the Rules, no co-operative society is entitled to engage daily rated employees. In the case before us none has raised a contention that appellant society got prior approval from the Registrar of Co-operative Societies to engage workman on daily wages. So, the appointment of a workman in the appellant bank was against the statutory provision. Smt. Lissy was appointed on 2-3-1983 on daily wages basis at the rate of Rs. 10/- per day. The wages was increased to Rs. 15/- per day and thereafter to Rs. 20/-. She continued to get that enhanced wages till her services were terminated on 1-4-1989. During the tenure of service, authorities under the Co - operative Department instructed the appellant bank to terminate the services of the daily rated employees. Those directions were not heeded to by the appellant bank till the vigilance department initiated action against the bank. As a result of such action, the bank was not in a position to continue the services of Smt. Lissy. Consequently her services were terminated. These facts clearly show that Smt. Lissy's services happened to be terminated because it could not be continued. Since her services were terminated while she was working as a Clerk on daily wages, she can be reinstated, if at all possible, only to that category of daily rated employee. No co - operative society, as per the rules can have a daily rated employee in its service. Therefore, the termination of service of Smt. Lissy cannot be considered as retrenchment as defined in the Act.

4. Stevedores had permanent workmen till the promulgation of Cochin Dock Workers (Regulation of Employment) Scheme, 1959 under the Dock, Workers (Regulation of Employment) Act, 1948. On coming into force of that Scheme, those workers got registered under the Scheme and consequently the Dock Labour Board became their employer. Workmen approached the Labour Court invoking the provisions of Sec. 33 C(2) of the Act to determine the compensation and notice pay payable to them for their past services under the Stevedores on the ground that they were retrenched from service. The Labour Court granted their prayer. The order of the Labour Court was challenged before this Court in *Hydrose y. Joseph Sanjon* (1967 KLT 975). K.K. Mathew, J. (as His Lordship then was) while allowing the petition filed by Stevedores observed:-

If volition or free choice is not available by compelling circumstances which leave no option to the employer but to terminate the service, then, the termination is not within the ambit of the connotation of the words "termination of service for any reason whatsoever. If the objective situation is such that both "termination" and "reason" are beyond the control of the employer, termination in that context would not be "retrenchment.

The learned Judge went on to observe:-

It seems to be that for attracting S. 25F of the Act the termination of services of

the employee must be by a voluntary act of the employer. If there was no termination of services by the employer out of his own volition but that the discharge of the employee was brought about on account, of the supervening act or event over which the employer had no control, then, it cannot by any stretch of language be said that there was termination of the service of a workmen by the employer. The essence of the idea of retrenchment is the termination of a workman's service by a voluntary act on the part of the employer.

We are in respectful agreement with the above observation made by the learned Judge. In the instant case, the appointment of Smt. Lissy was against statutory rules. As a result of that engagement, there was no legal relationship of master and servant between the bank and Smt. Lissy. Consequent on the coercive action and orders passed by the authorities under the Co-operative Societies Act, Smt. Lissy could not be continued in the employment of the Bank. So, her services had to be terminated. It was infact so terminated not as a result of any voluntary act of the bank. It was the result of the directives given by the authorities of the Co-operative Department, over which the bank had no control.

5. In *The Workmen of the Bangalore Woollen, Cotton and Silk Mills Co. Ltd. Vs. The Management of the Bangalore, Woollen, Cotton and Silk Mills Co. Ltd.*, the Supreme Court took the view that termination of service of workmen when the employer has no option in law to continue them in service is not retrenchment. Their Lordships observed:-

It seems to us that a service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued, that is to say, in the same manner in which it had been going on before, and it is, therefore, brought to an end, that is not a termination of the service.

This statement of law applies on all fours to the facts before us. The services of Smt. Lissy as Clerk on daily wages was not capable of being continued. Her services were terminated because she could not be continued in the same manner in which she was engaged earlier. It was as a result of such supervening impossibility the bank was compelled to terminate her Services. Such termination of service cannot amount to retrenchment as defined in the Act.

6. Petitioner in the decision *K.N. Gopalan v. State Bank of Travancore* (I.L.R. 1980(1) Ker 81) secured employment in the bank without disclosing certain material facts which if were disclosed would have disentitled him from getting the post. When that concealment of facts were noticed by the bank, petitioner's services were terminated. A Division Bench of this Court took the view that the termination of his service without enquiry was valid, since the appointment itself was void. Similarly in *Eranalloor Service Co-op. Bank Ltd v. Labour Court* (1986 KLT 801) a learned Single Judge of this Court look the view that the appointment of an employee in the co-operative society against the provisions contained in the Rules will not create a valid relationship of master and servant and hence not entitled to the protection of the provisions contained in the Act. This view of the

learned single Judge was confirmed in W. A. 524/1986. The Division Bench observed :--

On an examination of the qualifications possessed by the appellant and the statutory provisions in this regard, the learned Single Judge has come to the conclusion that the appointment of the appellant, was ab initio void as there was neither sanction, nor was the appellant possessing the qualifications prescribed by the statute. In these circumstances, it is not possible to take the view that the learned single Judge has committed any error in holding that the appointment of the appellant was ab initio void. If that is so, the question of compliance with section 25F of the Industrial Disputes Act does not arise as rightly held by the learned single Judge.

In *Urakam Service Co-op Society v. Sujatha* (1988 (2) K.L.T.S.N. 15 - Case No. 26) the co-operative society was directed to terminate the service of an employee as the appointment was made in violation of the provisions contained in the Co-operative Societies Rules. That termination gave rise to an industrial dispute. Labour Court took the view that the termination of the service was bad and illegal. Consequently the society was directed to reinstate the employee. The correctness of that decision was challenged before this Court. This Court allowed that Original Petition and quashed the award of the Labour Court holding that the society had no alternative but to terminate the services of the employee in compliance with the orders of the Registrar. In the instant case also the appointment of Smt. Lissy was against the provisions contained in the Co-operative Societies Rules and the Registrar directed the Bank to terminate her services.

7. Learned counsel representing Smt. Lissy brought to our notice a Division Bench decision of the Rajasthan High Court in *Prabhudayal Jat v. Alwar Sahkari Bhumi Vikas Bank Ltd.* (1991 Lab. I.C. 944) and contended that the termination of service of an employee, whose appointment was invalid, will also amount to retrenchment. The Division Bench, without much discussion, took the view that the employee's case there was not covered by any of the exceptions contained in the definition of retrenchment given in the Act and so the termination of service amounts to retrenchment. We find it difficult to agree with this view. We respectfully express our dissent from the said decision. Learned counsel representing Smt. Lissy submitted that even if the appointment of his client is vitiated, she should still be regarded as a workman, as a matter of fact since she has worked in the bank for nearly six years. We are not impressed with this argument. Her appointment was against the statutory rules. She cannot be continued in the post held by her. The management is having no volition to continue her in the service as daily rated employee. In these situations, we are clear in our mind that the termination of service of Smt. Lissy cannot be considered as retrenchment as defined in the Act. The result, therefore, is that the Labour Court was clearly in error in directing the bank to reinstate Smt. Lissy as Clerk. In the result, appeal is allowed. The judgment of the learned Single

Judge is reversed and Exhibit P3 award passed by the Labour Court, Kozhikode in I. D. 5/1991 is quashed. However, we make no order as to costs.