

(2001) 05 RAJ CK 0099

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4438 of 1990

Madan Singh Shekhawat

APPELLANT

Vs

Sikar Central Cooperative Bank Limited, Sikar

RESPONDENT

Date of Decision : 30-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25
Rajasthan Co-operative Societies Act, 1965 — Section 65, 75

Citation : (2001) 91 FLR 1042 : (2002) 1 RLW 254 : (2001) 3 WLC 610 : (2003) 2 WLN 368

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Advocate : Ashok Gaur, for the Appellant; M.D. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

Keshote, J.—This is a petition under Article 226 of the Constitution of India filed by the petitioner praying for quashing and setting aside the order dated 4.6.1990 (Annex.3) passed by the Managing Director, Sikar Central Cooperative Bank Limited, Sikar (hereinafter shall be referred to as "the respondent Bank") whereby the services of the petitioner were brought to an end. Further prayer is made for a direction to the respondent Bank to allow the petitioner to continue on the post of Chowkidar (Class IV).

2. This writ petition was admitted on 10th of September, 1990. The petitioner also filed stay therein for stay of the operation of the order dated 4.6.1990 (Annex.-3). Notices were issued to the respondents on the stay application returnable on 10.9.1990 (Annex.-3). Notices were issued to the respondents on the stay application returnable on 10.9.90. On 23.4.1991 this Court has been pleased to stay the operation of the order of termination of the services of the petitioner. This interim stay order not vacated meaning thereby in pursuance of this stay order the petitioner would have been continued in service. The writ

petition came to be rejected by the Court on 4th of August, 1994. This order of the Court was taken by the petitioner in appeal being D.B. Civil Special Appeal (W) No. 777/1994, which was come to be allowed by the Division Bench on 23.4.2001. The application u/s 151 of the C.P.C. filed by the petitioner in appeal for permitting him to produce certain documents on record was allowed. The respondent Bank was given an opportunity to file a reply to the main writ petition and also to the documents filed by the petitioner alongwith that application. This opportunity given by the Division Bench to the respondent Bank has not been availed of by it. The respondent Bank has chosen not to file the reply to the writ petition as well as to the documents which are ordered to be taken on record by the Division Bench. It is unfortunate that the petitioner has not cared to file those documents on record of this writ petition. However, a set of these documents is taken by the Court from the counsel for the petitioner with the consent of the counsel for the respondent Bank.

3. The learned counsel for the respondent Bank does not dispute that these are three documents which were permitted by the Division Bench to be produced by the petitioner in the writ petition. The details of these documents are as under:-

1. (Document Annexure-1) The copy of the order dated 16.12.1986 passed by the Managing Director, Sikar Central Cooperative Bank Limited, Sikar whereby Shri Ram Kishan Meena son of Shri Ratan Lal Meena was appointed as Class IV employee purely on temporary basis on daily wages;

2. (Document Annexure-2) The copy of the order dated 1.8.1987 passed by the Managing Director, Sikar Central Cooperative Bank Limited, Sikar, whereby Shri Balbir Singh son of Shri Ram Kumar Singh was appointed for 80 days with effect from 1.8.1987 on the post of Chowkidar purely on temporary basis on daily wages;

3. (Document Annexure-3) The copy of the certificate issued in favour of the petitioner Madan Singh Shekhawat, Class IV Employee by the Branch Manager of the respondent Bank on 1.8.1993.

4. Consequence of non filing of the reply to the writ petition and objection to the aforesaid documents, which were permitted by the Division Bench to be produced by the petitioner in these proceedings, is that the averments made in the writ petition remained uncontroverted and the same are taken to be correct.

5. The learned counsel for the petitioner challenging the order dated 4.6.1990 of the respondent Bank raised following contentions (i) The petitioner was denied the right of equality as the persons who were junior to him have been retained in service, and he was asked to go to home; (ii) the services of the petitioner were dispensed with wholly on flimsy grounds; (iii) there was no complaint of unsatisfactory work of the petitioner during last five years; (iv) the other ground given of non sanctioning of the post of Chowkidar by the respondent Bank it is submitted that in place of the petitioner other person was appointed by the respondent Bank on the post of Chowkidar; (v) the petitioner continued to work

from the year 1985 to 6th of June, 1990 i.e more than 240 days in a 12 calendar months immediately preceding the date of termination of his services and before dispensing with his services the procedure which has been laid down in the Industrial Disputes Act, 1947 (for short "the Act of 1947") was to be followed. In his submission it is contended that the petitioner has not been given one month's notice or the pay in lieu of notice as well as retrenchment compensation and the mandatory provisions of Section 25F of the Act of 1947 have been violated; (vi) The action of the respondent Bank to keep the junior persons in the service and terminate the services of the senior is violative of the provisions of Section 25-G of the Act of 1947.

6. Shri M.D. Agarwal, learned counsel appearing on behalf of the respondent Bank, firstly prayed for grant of time to file reply to the writ petition.

7. I do not find any substance in this prayer made by Shri Agarwal. This petition has been filed by the petitioner way back on 1.9.1990 and it was admitted on 10.9.1990 and before this returnable date the respondent Bank was served with the notice of the petition but the respondent Bank did not file reply to the petition. This petition has been decided earlier by the Court on 4th August, 1994. If the respondent Bank was really desirous of contesting the petition, it has more than sufficient time to file the reply before 4th of August, 1994. The matter does not end here. The order aforesaid of the Court dismissing the writ petition has been taken in appeal. The appeal was admitted and the respondent Bank could have filed the reply to the petition in appeal. That has also not been done. In appeal, on behalf of the respondent Bank, Shri Agarwal was the counsel who appeared. He may know very well what order has been passed and what indulgence has been granted in appeal by the Division Bench to the petitioner. The Division Bench has given an opportunity to the respondent Bank to file a reply to the main petition and also to the documents filed alongwith the application u/s 151 of the C.P.C. This order has been made by the Division Bench in appeal on 23.4.2001. This matter has come up for hearing in the Court on 13.5.2001 i.e. after more than one month of passing of the order. The respondent Bank has more one month time to its disposal to file the reply to the main petition as well as to the documents which were permitted by the Division Bench to be produced by the petitioner in the present proceedings. The respondent Bank has not availed of this opportunity and no further indulgence can be granted to the respondent Bank in the matter.

8. Shri M.D. Agarwal, learned counsel for the respondent Bank, raised a preliminary objection in regard to maintainability of the writ petition. It is submitted that the petitioner is seeking the benefits of a statutory provision and when under that very statute itself remedy is available, that remedy has to be availed of. In support of his contention Shri Agarwal placed reliance on the decision rendered by five Judges, Bench of this Court in the case of Gopi Lal Teli v. State of Rajasthan (1). Another preliminary objection raised is that the petitioner has an alternative remedy available u/s 75 of the Rajasthan

Cooperative Societies Act, 1965. Lastly it is contended that it was only a contractual appointment and even if before termination of the services of the petitioner compliance of the provisions of Section 25-F of the Act of 1947 is not made this Court may not order for his reinstatement. At the most the petitioner can be awarded the damages.

9. I do not find any merit and substance in any of the contention raised by the learned counsel for the respondent Bank. It is true that the 5 Judges Bench has ruled that where a workman is complaining violation of the provisions of Section 25-F of the Act of 1947 while retrenching him from service by employer, the appropriate remedy is to raise an industrial dispute. However in the decision the Court has taken care that this strict rule of availing of alternative remedy may have an exception that is to say where on facts if dispute is not there of non compliance of the provisions of Section 25-F of the Act of 1947, the writ petition filed in this Court may be entertained. In this case the reply to the writ petition has not been filed by the respondent Bank and, as such, the averments made in the writ petition by the petitioner that he has worked for more than 240 days in a 12 calendar months preceding the date of termination of his services; he is a workman; the respondent Bank is an industry; there was no reason to terminate his services and lastly the provisions of Section 25-F of the Act of 1947 have not been complied with, stand uncontroverted. No doubt, it is a question of fact whether provisions of Section 25-F of the Act of 1947 have been complied with or not by the employer before terminating or dispensing with the services of the workman. If the petitioner made a categorical statement of fact and the same is not denied then it is to accepted and that what exactly is there in the present case also. The respondent Bank, has not filed reply to the writ petition and, as such, it does not remain in dispute that before dispensing with or terminating the services of the petitioner the compliance of Section 25-F of the Act of 1947 has not been made by the respondent Bank.

10. Yet there is another reason for which this writ petition cannot be thrown on the ground of availability of alternative remedy. This writ petition was filed way back in the year 1990 and the respondent Bank has not raised any objection regarding its maintainability on the ground of availability of alternative remedy to the petitioner. It is true that this writ petition has been admitted ex parte but on service of the notice of the writ petition if the respondent Bank was really desirous to raise this preliminary objection, it could have filed an application raising this point and requested the Court to decide the same first. What to say that no such application has been filed even the respondent Bank has not cared to file the reply to the petition. When the respondent Bank has not filed the reply to the writ petition, it has to be presumed that it has no objection regarding maintainability of the writ petition on the ground of availability of alternative remedy to the petitioner. For the same reasons the preliminary objection raised by the petitioner regarding availability of alternative remedy u/s 75 of the Rajasthan Cooperative Societies Act, 1965 deserves no acceptance.

11. Against the decision earlier given in this petition by the Court, as said earlier, the petitioner filed Special Appeal. It is not the case of the learned counsel for the respondent Bank that before the Division Bench this preliminary objection has been raised by him. The matter has been decided by the Division Bench in appeal and the Division Bench did not dismiss the case on the ground of availability of alternative remedy. It is now, at this stage, not justified, fair and reasonable to raise such a plea by the respondent Bank. The respondent Bank has to come up in the Court as a model employer rather than to take all such preliminary objections. All endeavour has to be made and it is also expected from this class of the employer that on a petition being filed in this Court by its employees in the matter of service disputes, rather to raise frivolous preliminary objections it should have contested the matters fairly on merits. It is to be stated at the cost of repetition that reply to the writ petition has not been filed by the respondent Bank and from this fact reasonably a inference can be drawn that it has no defence on merits in the mater. Otherwise also it clearly reflected from the arguments advanced by the learned counsel for the respondent Bank that it has failed to set up a case in its favour on merits and that is the reason that these preliminary objections have been raised.

12. The last preliminary objection raised regarding the contractual appointment of the petitioner. It is contended that this Court may not order for reinstatement of the petitioner back in service even if the provisions of Section 25-F of the Act of 1947 have been, violated. It is suffice to say that this objection is also devoid of any merit and substance. The petitioner is admittedly a workman and the respondent Bank is an industry and his service conditions are regulated under the provisions of the Act of 1947. Where an employer industry desirous of retrenching a workman, the mandatory provisions of Section 25-F of the Act of 1947, are to be complied with and if same are not complied with in terminating his services then the consequences there of are of reinstatement of the workman in the service with full back wages. In such matters the contention advanced by Shri M.D. Agarwal, learned counsel for the respondent Bank, does not available to the employer.

13. On merits, it is not in dispute that the petitioner is a workman; the respondent Bank is an industry and the petitioner has completed more than 240 days of service in a 12 calendar months immediately preceding the date of his termination of his services and the provisions of Section 25-F of the Act of 1947 have not been compiled with. Thus the order of termination of the services of the petitioner passed on 4.6.1990 by the respondent Bank is illegal. This petition deserves to be allowed only on this ground. Otherwise also no other contention has been raised by the learned counsel for the respondent Bank and the petitioner which requires to be gone into and to give any decision thereon.

14. In the result this writ petition succeeds and same is allowed. The order dated 4.6.1990 is set aside. The respondent Bank is, directed to reinstate the petitioner back in the service forthwith. The petitioner is entitled for the back wages also.

15. The petitioner was a daily wager. For the litigation in the Court heavy costs are to be borne by the litigant. It is very difficult for this category of employees to afford heavy expenses of this litigation. But as it is the question of live hood of the petitioner naturally he has left with no option except to file the present writ petition and for this he had to arrange finance either by selling the property or ornaments of his wife or borrowing the same from the persons who would have certainly charged interest at a very high rate. The action of the respondent Bank is found to be illegal and I consider it to be a fit case where costs are to be awarded in favour of the petitioner and against the respondent Bank. The cost does not mean to award a nominal or token cost or a cost for the sake of the cost. Once the court reached to the conclusion that injustice is caused to a person moreso when it is a case of a tow paid employee i.e. daily wager then the cost is to be awarded to the extent of actually expenditure borne by the litigant for this litigation. Learned counsel for the petitioner submits that he had charged Rs. eleven thousand to provide the petitioner his professional services. Earlier another counsel was appearing for the petitioner and he would have also charged his fee from the petitioner. In addition to this eleven thousand rupees which were paid by the petitioner to his counsel towards his professional fee the petitioner would have incurred heavy expenses of typing charges, court fee, stamps and incidental charges, court fee, stamps and incidental charges of filing of the writ petition. Not only this the petitioner has to file an appeal in the matter which would have been also costs heavily to him.

16. Learned counsel for the respondent Bank strongly opposed firstly awarding of the costs itself and secondly to award the cost of Rs. eleven thousand in favour of the petitioner. Awarding or not awarding costs is a discretion of the Court and in this respect the other side has no right to object. Otherwise also I failed to see any justification in this opposition by the learned counsel for the respondent Bank of awarding the costs in favour of the petitioner. So far the quantum of the amount is concerned it is also a matter of discretion of the Court. However, discretion is to be exercised judiciously.

17. In a case where a daily wager filed the writ petition and pay an amount of Rs. eleven thousand to his counsel for providing his professional services if only a token cost is awarded to the petitioner, it would certainly cause another serious injustice to him. The petitioner is not present in the Court but looking to his status in the society, his job and the wages it can safely be assumed, presumed and accepted that he would have to arrange this amount either by selling his property, ornaments or by borrowing the same from money lender for which he would have been paying heavy interest over the money, if he does by his wages it is very difficult for him to pay of this amount to the money lender within a reasonable time. There is no provision under the Advocates Act or under any other Act enacted by the Parliament or the State Assembly providing scale of fees which is to be charged by the Advocates in the matters of different categories. The Advocate is a professional and whosoever approached to him for engaging him and to provide his professional service he can legitimately claim his

own fees. It is his fees and whosoever desirous of taking his professional services, that amount has to be paid. The Advocates cannot be blamed even in a case where he charged heavy fees from a daily wages employee in his matter and in this case the counsel for the petitioner is justified to take his own fees for rendering his professional service to the petitioner. In view of this fact if a token cost is awarded then certainly this poor petitioner would be sufferer.

18. I do agree that looking to the status and wages of the petitioner, he may be eligible and entitled for free legal aid. But he has not availed of his this legal right and for this there may be obviously two reasons; firstly he would not have been aware of his this right and secondly he would not have been made known of his this legal right. In either of the case it is expected of the Members of the Bar that as and when litigants of this category approach to them they may make know them of their this legal right so that the poor persons may not be burdened with this heavy expenses of litigation. It is unfortunate that the persons at the receiving end of this benefit of free legal aid as available to them under the Legal Services Authorities Act, 1985 are not getting the benefits thereof. It is the duty both the Bench and the Members of the Bar to see that the persons who are eligible to get the free legal aid, get this benefit. The Member of the Bar are requested to bring this right to the notice of this class of persons who are eligible for the free legal aid so that persons at receiving end can get the benefits.

19. As a result of the aforesaid discussion, I am satisfied that this is a fit case where the petitioner is to be awarded Rs. eleven thousand as costs of the petitioner in his favour and against the respondent Bank.