
(2000) 05 RAJ CK 0072

In the Rajasthan High Court

Case No : C.S.A. No's. 1006 to 1008 of 1999

Railway Employees Co-operative Banking Society Ltd.

APPELLANT

Vs

Authority Under Shops and Commercial Establishments Act
and Others

RESPONDENT

Date of Decision : 19-05-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 2, 2A

Multi-State Cooperative Societies Act, 2002 — Section 74

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

Citation : (2000) 84 FLR 1008 : (2000) 3 LLJ 898 : (2000) 3 RLW 1883 : (2000) 1 WLC 159 : (2000) 3 WLN 344

Hon'ble Judges : S.K. Garg, J;Rajesh Balia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Daulat Singh and Others Vs. The Railway Employees Cooperative Banking Society Ltd. and Another, (2004) 3 JT 78 : (2004) 2 LLJ 352 : (2004) 2 SCALE 667 : (2004) 12 SCC 478 : (2005) SCC(L&S) 353

1. Heard learned counsel for the parties.
2. The above three appeals raise common issues and arise in identical facts and circumstances hence are heard and being decided by this common order.
3. The appellant, Railway Employees Co-operative Banking Society Ltd., Jodhpur Division branch, Jodhpur, has come against the order of learned single Judge dismissing the petition filed by the appellant against the order passed by the Authority under the Rajasthan Shops and Commercial Establishments Act, 1958 (hereinafter called the Act) holding that termination of services of the respondent Daulat Singh in Special Appeal No. 1006/1999 is contrary to the provision of the said Act and illegal. The said respondent No. 1 had lodged a complaint before the

Authority under the Act alleging that he has been continuously in service for a period of not less than six months with the appellant Society, but his services were unceremoniously terminated w.e.f. January 1, 1993 without giving any notice and without any reason in violation of Section 28-A of the Act of 1958.

4. The present appellant has contested the application on the ground that Authority under the Act of 1958 had no jurisdiction to entertain the said application inasmuch as the question regarding employment or non-employment of any employee squarely falls to be decided by the Registrar Co-operative Society in view of the provisions of Section 74 of Multi State Co-operative Society Act under which the appellant Society is registered and is governed by that statute. It was also urged that services of the respondent-employee was terminated in fact on August 20, 1992 and he has not been employed for a period of six months or more. It was also urged that since appointment was given by one Mohan Singh who was usurper of the office, the appointment was illegal from the inception and would not give any right to the appellant to continue in the service of Co-operative Society, in favour of the respondent-incumbent.

5. The other two appeals are in respect of similar applications made by two other applicants viz., on similar facts for same reliefs u/s 28-A of the Act.

6. The preliminary objection as to the jurisdiction of authority under the Act of 1958 was overruled by the said authority by holding that word "Management" cannot be given a wide connotation and that a dispute raised against a Co-operative Society where a discharged servant claims reinstatement in service is from its very nature outside the scope of the expression "touching the management of the Society" and that the Registrar of Co-operative Societies has no jurisdiction to deal with such a dispute which falls within the jurisdiction of Industrial Tribunal or Labour Court under the Industrial Disputes Act 1947. The observation of the Supreme Court in Sikar Kendriya Sahakari Bank Ltd. v. Prescribed Authority 1993-II-LLJ 961 on the question was referred. It was found on facts that though in the application the employee has claimed to be appointed on July 19, 1992, but on the basis of documents produced by the Management itself, the first appointment was given to the claimant on June 19, 1992. It has been admitted by the Management that regular wages has been paid to the workman from June 1, 1992 to November, 1992. The Authority: referred to document Ex. M-9A to find that in December, 1992 also the attendance of the incumbent has been registered in the Attendance Register. From these materials the Authority held that before termination of service the workman has worked continuously for a period of six months with the appellant Society. There was no denial of the fact that services have been terminated without any notice inasmuch as the plea taken by the appellant was that since the employment of the respondent was illegal from the beginning he was not required to serve with any notice and that employees were not employed continuously for a period of six months. The procedure required before termination of service of an

employee, who has been continuously in service for not less than six months, has not been followed. Termination orders, therefore were found to be invalid and all the three employees were ordered to be reinstated. The same contention raised by the appellant before the learned single Judge in writ petition did not find any favour and the petition has been dismissed. The same contention has been reiterated before us.

7. The relevant provision which governs the issue related to the jurisdiction is Section 74 of the Act of 1984. It is reproduced herebelow:

"74. Disputes (1) Notwithstanding anything contained in any other law for the time being in force, if any dispute (other than a dispute regarding disciplinary action taken by a Multi-State Co-operative Society against its paid employee or an industrial dispute as defined in Clause (k) of Section 2 of the Industrial Disputes Act, 1947 (Act No. 24 of 1947) touching the constitution, management or business of Multi-State Co-operative Society arises....Such

dispute shall be referred to the Central Registrar for decision and no Court shall have jurisdiction to entertain any suit or other proceedings in respect of such dispute....."

8. A bare perusal of the provision goes to show that from all pervading jurisdiction given to the Central Registrar in relation to the disputes touching the constitution, management or business of Multi Co-operative Society falling within the purview of Section 74, two exceptions have been carved out. Firstly the dispute regarding disciplinary action taken against its employee by the Multi-State Co-operative Society shall remain outside the scope of Section 74. Secondly also an industrial dispute as defined in Clause (k) of Section 2 of the Industrial Disputes Act, 1947 is also outside the scope of Section 74. The learned single Judge has opined that the dispute about termination of service of its employee, falls within the ambit of "industrial dispute" under the Industrial Disputes Act, 1947.

9. Learned counsel for the appellant vehemently urged that industrial dispute as envisaged in Section 2(k) does not include an individual dispute between employer and a single employee unless the same is espoused by a Union or large number of workmen therefore per se a dispute of the nature of termination of an individual workman does not fall within the definition of Section 2(k) of the Act of 1947.

10. The contention does not sustain itself in view of the provision of Industrial Disputes Act 1947.

11. It is true that until insertion of Section 2-A of the Industrial Disputes Act, 1947 in 1965, it has been laid down that any individual dispute affecting a workman cannot be per se an industrial dispute but can become one if it was espoused by a trade Union or by substantial number of workmen of the establishment.

Reference in this connection may be made to some of the cases decided by Supreme Court viz. (1) Central Provinces Transport Services Ltd. Vs. Raghunath Gopal Patwardhan, (2) Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate, Workmen of Dharampal Premchand (Saughandhi) Vs. Dharampal Premchand (Saughandhi), That fought in legislative intervention through Industrial Disputes (Amendment) Act, 1965 w.e.f. December 1, 1965 and Section 2-A was inserted which reads as under:

Section 2-A: Dismissal etc., of an individual workman to be deemed to be an industrial dispute :- Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

12. The aforesaid provision took away the foundation of aforesaid decision and gave extended meaning to express as industrial dispute in Section 2-A of the Act of 1947 refers to dispute relating to dismissal, retrenchment or otherwise termination of services of an individual workman, which are deemed to be industrial disputes whether such dispute is espoused by a Union or number of workmen or not. Thus individual dispute of the nature falling u/s 2-A, also came within the purview of "industrial dispute" as defined u/s 2(k) is to be treated as "industrial dispute" for all purposes. In this connection we may usefully refer to a decision of Calcutta High Court in Tihargarh Jute Factory Co. v. Sriram Tewari, 1979-I-LLJ-495 wherein a like contention was raised that an individual dispute with his employer though may be an industrial dispute within the meaning of Section 2-A of the Industrial Disputes Act, 1947, it is not so u/s 2(k). Repelling the contention the Court said in 1979-I-LLJ-495 at 497:

"9. Mr. Banerjee, appearing in support of the Rule contended that even though the dispute in the present case may not be an industrial dispute under Clause (k), it becomes an industrial dispute in view of the provisions of Section 2-A. The said Section 2-A was introduced by the amending Act Number 35 of 1965. The provision of Section 2-A has to be read along with said Clause (k) for ascertaining whether an individual dispute not championed by the Union or by a number of workmen is an industrial dispute. Said Section 2-A came into force on December 1, 1965 and the present suit was instituted on July 26, 1977. There can, therefore, be no doubt that Section 2-A shall have to be taken into consideration in determining whether the question involved in the present suit gives rise to an industrial dispute. Thus, after the introduction of Section 2-A an individual dispute though not sponsored by other workmen or espoused by the Union would be deemed to be an industrial dispute within the meaning of the Act but whether a particular dispute amounts to an industrial dispute has to be ascertained with reference to the principle laid down in said Clause (k), for, so far as the subject-matter of the dispute is concerned Section 2-A does not bring

about any change. That has to be determined with reference to the provisions of Clause (k). The only change that was brought about by Section 2-A is this that prior to its introduction a dispute even though it was an industrial dispute according to the subject-matter referred to in Clause (k) would not have become an industrial dispute if it were only an individual dispute not taken up either by the Union or by a substantial body of workmen but after the introduction of Section 2-A such a dispute would be an industrial dispute though it is not sponsored by a Union of workmen or by a number of them."

13. The above view fortifies us in the conclusion to which we have reached.

14. We may make it clear that all the disputes of individual nature still do not fall within the purview of an "industrial dispute" as defined u/s 2(k) read with Section 2-A of the Industrial Disputes Act, 1947. Still except the disputes relating to the "discharge, dismissal, retrenchment or otherwise termination of service" all other disputes relating to terms of employment or conditions of labour of an individual workman, such as transfer, wages, bonus, promotions etc. will require espousal by a substantial number of workmen in order to do the colour of having a community of interest, necessary to become an industrial dispute. In other words, while dispute relating to termination of service, in all cases whether individual character whether or not espoused by substantive fellow workmen, is an "industrial dispute", and dispute of all other nature, if concerns an individual workman does not per se become an industrial dispute but may become one on espousal by any Union or by a substantial number of fellow workmen.

15. We cannot lose sight of the fact that Section 74 of the Act of 1984, provides such fields which have been kept out of purview of Section 74 of the Act of 1984.

16. Section 74 does not confine the exclusion of such disputes from the jurisdiction of Central Registrar, to the dispute triable by other specified Tribunals only. It has not envisaged merely serving of jurisdiction of Industrial Tribunal or Labour Court under Industrial Disputes Act, 1947, but has left the dispute in the nature of industrial dispute and relating to disciplinary actions to be subjected to other remedial fora as may be available to the aggrieved party. No other ground is raised to challenge the jurisdiction. We therefore over-rule objections as to jurisdiction of the Authority under the Act to try the dispute.

17. On merit of the order, it has been contended by the learned counsel for the petitioner appellants that in all the three appeals an error apparent on record exists so far as finding as to existence of precondition of invoking Section 28-A of the Act is concerned. An employee has to establish before invoking protection of Section 28-A of the Act, that he is continuously in service for 6 months or more at the time his services are terminated. It has been urged that even on the basis of evidence relied on by the Authority, accepting their correctness on face value, none of the workmen concerned can be said to be in continuous service for six months. Neither the claim submitted by the applicant discloses that the applicants-employees had worked for 6 months continuously in terms of Section

28-A of the Act so as to entitle them to protection u/s 28-A of the said Act, nor the evidence on the basis of which the Authority under the Act, has held six months continuously working by the applicants, supports the conclusion reached by the authority. It is a case in which the finding is perverse on the basis of taking material relied on by authority on their face value.

18. Learned counsel for the respondents did not dispute the fact that the averments in the claims petition or reply thereto makes the period of continuous working fall short of 6 months of services. However, learned counsel for the respondents urged that since the Authority under the Act is not bound by the technical rules and procedure concerning pleadings as emanated from the Code of Civil Procedure, the Authority has reached its conclusion after appreciation of evidence that has come on record particularly from the record of employee, this Court in extraordinary jurisdiction will not sit over the finding as an Appellate Authority to examine the merit of the evidence and re-appreciate the same.

19. We are conscious of the restraints and constraints which this Court in its extraordinary jurisdiction exercises, while considering the prayer for issuing a writ of certiorari. However, the two well known grounds for issuing a writ of certiorari are that if order suffers from inherent lack of jurisdiction on the part of Authority who has passed the order or the order suffers from an error apparent on face of record. We have found that it is not a case where Authority lacked jurisdiction to adjudicate upon the subject. Ordinarily the findings of fact recorded on appreciation of evidence by the Subordinate Tribunal is binding and is not to be appreciated by this Court. But if a case is made out where there is no evidence on which such finding could be reached by any reasonable person or the evidence on which reliance has been placed, accepting its reliability, does not lead to such conclusion at all to which the Authority has reached vitiates the finding and the order is considered to be suffering from error apparent on the face of record. Here is a case where we are called upon to consider the finding of arithmetical computation of work period of six months by the workman which gives jurisdiction to authority u/s 28-A to make orders thereunder as established on the basis of evidence referred to by the authority for reaching its conclusion. If two plus two has been accepted as three it will certainly be a case of mistake apparent from record. Where such a plea is revised it needs to be examined.

20. Notwithstanding limitations of jurisdiction under Article 226 or 227, the question as to existence of an error apparent on record cannot ordinarily be answered without, examining the record. It is one thing to say whether any error apparent from record is made out or not, and mere appreciation of evidence does not give rise to mistake apparent from record, but it is quite another thing to say that because of limits of jurisdiction the Court ought not to look at the record at all, because the finding is a finding of fact. The latter proposition is not well founded. Ordinarily it is not possible to answer the question about existence of an error alleged to be apparent from record without examining the record. The

Court cannot stop its question for answer merely on finding that the conclusion recorded by Subordinate Authority is a conclusion of fact. If it is alleged that such conclusion too suffers from error apparent from record, the question has to be examined, not to find the correctness of finding by evaluating evidence, but to find whether there is any legal error committed by the Authority in reaching its conclusion. It also takes into account where such finding is unsupported by any evidence, or is founded on the material on which no person with ordinary prudence will reach such conclusion or that such finding has been reached by ignoring relevant material is based on irrelevant consideration. These questions can only be answered after examining record.

21. The above principles have been well established spelling out the ground on which writ of certiorari can be issued. The Supreme Court in *The Provincial Transport Service Vs. State Industrial Court*, said:

"When it appears to an appellate Court that no person properly instructed in law and acting judicially could have reached the particular decision, the Court may proceed on the assumption that misconception of law has been responsible for the wrong decision. The decision of the Labour Commissioner that no enquiry had been held by the management amounts, therefore, to a clear error of law. The Tribunal errs in thinking that it was bound by the decision of Labour Commissioner and this error on its part was an error so apparent on the face of record that it was proper and reasonable for the High Court in proceedings under Articles 226 and 227 to correct the error."

22. That was a case wherein an industrial dispute relating to the dismissal of an employee for misconduct, the employee has contended that no enquiry was held by the Management before dismissal. The Management has alleged otherway. It produced papers showing evidence that was recorded during the enquiry.

The documents bore the signatures of witnesses including that of delinquents, but did not contain the signatures of Enquiry Officer. With these facts the Labour Commissioner reached a finding of fact that it was doubtful whether the enquiry was at all made. Notwithstanding it being a finding of fact, on perusal of record the Court found the finding to be perverse and liable to be corrected by issue of a writ of certiorari under Articles 226 and 227.

23. The Supreme Court articulated contours of a enquiry into Issue of writ of certiorari by the Courts in their extraordinary jurisdiction in *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, Hon^{ble} GAJENDRAGADKAR, J. said about general principles governing limits of writ of certiorari (at page 479):

"The question about the limits of the jurisdiction of High Court in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction, committed by inferior Courts or Tribunals; these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to

exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice."

24. About scope of correcting errors of fact which can be treated as error apparent on the face of record to warrant issuing writ of certiorari, he said:

"In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

25. Again similar view was expressed in Mohd. Shafi Vs. Additional District and Sessions Judge (VII), Allahabad and Others, We need not multiply the precedents.

26. Thus in each case where relief depends on a finding of fact, and its validity is challenged it will have to be examined on the touchstone to test whether it is a case of mere appreciation of evidence. In such event no interference can be made. On the other hand if the error is manifest in such a manner that it transgresses onto the realm so as to become an error of law, it is appropriate for the Courts to correct such error in exercise of its jurisdiction under Articles 226 and 227.

Section 28-A of the Act reads as under:

"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 six months except for a reasonable cause and after giving such employee at least one month prior notice or paying him one month wage in lieu of such notice".

27. There being no special meaning assigned to continuous employment for a period of six months, the expression must be accepted in its ordinary meaning viz., continuous employment for six continuous calendar months immediately preceding the date of termination of service. To illustrate if service of an

employee is terminated on July 15, 1990, he must on that date be in continuous service w.e.f. January 15, 1990. Period of employment for less than six completed calendar months cannot invite operation of Section 28-A of the Act.

28. In these cases termination of employment is not claimed under any written order, but has been alleged to be verbal termination since last working. The applicants in their applications have laid their claims as under in each case:

Daulat Singh, applicant in Special Appeal No. 1006/1999 in his application has alleged that he was appointed on July 20, 1992 and worked upto December 31, 1992. However he states that he has not been paid salary for December, 1992 and that his attendance for working upto December 7, 1992 was not marked in attendance register. Thus he admits to have actually worked only upto December 7, 1992. About termination he only states that he was not allowed to join on January 1, 1993. However he does not say anything about period between December 8, 1992 to December 31, 1992. The actual functioning according to application is for a period of 4 months and 18 days from July 20, 1992 to December 7, 1992 and the total period upto December 31, 1992 also makes a total of five months and 11 days.

Naresh Kumar, the applicant-respondent in Appeal No. 1007/1999 avers in his application that he was first appointed on July 19, 1992 and marked his attendance upto December 18, 1992 and thereafter due to some reason did not work between December 19, 1992 to December 31, 1992, w.e.f. January 1, 1993 he was stopped from marking attendance in attendance register. His averments makes out a total actual working for a period of five months only (July 19, 1992 to December 18, 1992) and upto December 31, 1992 also his total employment falls short of six months by 18 days.

29. Similarly in Special Appeal No. 1008/1999 Mangilal-respondent in his application has alleged that he was employed on July 20, 1992. He was paid salaries upto November 1992. That his attendance was marked upto December 7, 1992, but he worked upto December 31, 1992 and w.e.f. January 1, 1993 was refused to be taken on duty. The total period of employment alleged under the application comes to 5 months and 11 days only.

30. In reply to each application actual date of commencement of employment was not disputed but it was alleged that services came to an end on August 20, 1992 itself, and no attendance was marked after August 20, 1992. However in the circumstances detailed in reply it was admitted that applicant took their account upto November 30, 1992 and left the services.

31. On these pleadings in each of the case on admitted case of fact applicants no case of six months continuous employment was disclosed.

32. However on the basis of a document dated June 16, 1992 and attendance register for December, 1992 the date of beginning and end of service was taken to be June 16, 1992 and December 31, 1992 respectively. The letter dated June

16, 1992 discloses applicant was appointed as a casual workman @ Rs. 22/- wages per day of actual working for a period of one month only. In each case the appointment letter dated June 16, 1992 reads:

"With reference to your application dated.....you are offered a temporary appointment as casual labour for a specific period of one month from June 16, 1992 to July 15, 1992 on the following terms and conditions....."

33. In each case the appointment being for a specified period upto July 15, 1992 only, it came to an end on July 15, 1992.

34. In each case the letter of appointment dated July 19, 1992 was issued on the basis of which alone the claim was founded. It reads as under:

Railway Employees Co-operative Bank Society Ltd. Jodhpur.

Section No. R.E.C.B. S/Esstt/DS/P/6

Dated July 19, 1992

Shri Daulat Singh Sankhala

S/o Shri Durga Singh Ji Sankhala,

Outside Chandpole Gate,

Near Vidhyashala School,

Jodhpur.

Sub : Appointment as a peon in this society.

As a result of selection held in the office of the society today, you have been found to have passed the selection for the post of peon in the grade 750-940 with usual allowances as admissible to other staff of the society from time to time w.e.f. July 20, 1992.

You will be deemed to have been confirmed in the grade on completion of your 50 days' service from the initial date of your joining as casual labour in the office of the society, provided there is no complaint and/or adverse report against you during this period of 50 days.

Sd/-

HONORARY SECRETARY

Copy Received.

Sd/-

(DAULAT SINGH SANKHALA)

Dated July 19, 1992

35. This new appointment was offered w.e.f. July 20, 1992. There is a clear

hiatus of 5 days between employment under letter dated June 16, 1992 and new appointment letter dated July 20, 1992. It was nobody's case at any stage that any of the applicants was in continuous employment of Society since June 16, 1992. That makes it clear, why the applicants had pleaded employment w.e.f. July 20, 1992 only. That is because they could claim continuous employment only w.e.f. July 20, 1992 and not earlier thereto. A bare perusal of Section 28-A will reveal that requirement is not that if any person has been in employment of an establishment for only six months. Precondition for operating Section 28-A is something more viz. "continuously employed for not less than six months". Thus an unbroken period of employment for a duration of six months or more as on the date of termination of service is a condition precedent for invoking the provision of Section 28-A of the Act.

36. Learned Authority under the Act, in our opinion clearly fell into an apparent error in ignoring the requirement of continuity of employment without a break for a period of six months. If an incumbent has in totality worked for six months, but his employment does not satisfy the test of continuous and unbroken period of not less than six months employment the provisions of Section 28-A are not attracted. In reaching its conclusion the Authority has ignored the legal requirement of Section 28-A as well as the fact emanating from the document dated June 16, 1992 that it did not offer any employment for indefinite continuation but was for employment upto July 15, 1992 only. In the absence of any material and objection to term of employment dated June 16, 1992 and to the automatic end of the service stipulated under the letter of appointment dated June 16, 1992 on July 15, 1992, and fresh employment, which only continued up to the alleged date of termination came into effect only on July 20, 1992, there was no continuity of service between July 15, 1992 to July 20, 1992 or to wit the applicants were not in the employment of Society on any view of the matter on July 16, 1992, July 17, 1992, July 18, 1992 and July 19, 1992. Thus the order of the Authority under the Act suffered from an error of law as well as of fact on the question of "continuous employment for not less than six months" which is apparent from record. A case for issue of writ of certiorari was clearly made out. The order under appeal also suffers from the same error.

37. We have, therefore, no hesitation in coming to the conclusion that since there was no evidence before the Authority to reach the conclusion that any of the applicants was in continuous service of six months, and precondition for invoking Section 28-A of the Act has not been established. Hence the provisions of Section 28-A could not have been invoked in the facts of the present case.

38. Accordingly, the appeals are allowed and order of the learned single Judge as well as order passed by the Authority under the Shops and Commercial Establishments Act, Jodhpur, in each case is set aside. There shall be no order as to costs.