
(1975) 01 KL CK 0007
In the High Court Of Kerala

Sankaran

APPELLANT

Vs

Dy. Registrar of Co-operative Societies

RESPONDENT

Date of Decision : 03-01-1975

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1977) 2 LLJ 171

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Judgement

T. Chandrasekhara Menon, J.—The petitioner worked as a clerk and then as an accountant under the second respondent Co-operative Credit Society (the Society for short). The Society originally registered under the Madras Cooperative Societies Act, 1932 is now under the relevant provision of the Kerala Co operative Societies Act, 1969 hereinafter called the Act) deemed to be registered under the Act. He had joined the service of the Society on 14.12.1957 as a clerk and then promoted as accountant on 28.3.1960. He was promoted as Treasurer of the Society on the basis of his seniority on 25.7.1966. The petitioner has got a case that his promotion was made reluctantly by the Board of Directors of the Society who were really forced to do so when he objected strongly when a junior of his one P. Narayanan Nair was sought to be promoted to that post. The allegation is that this made the Directors ill-disposed towards him.

2. The petitioner's contentions in the O.P. are that as a result of the ill-will of the Directors against him, he was dismissed from the service of the Society illegally and in violation of the principles of natural justice on 23.1.68, the dismissal being made effective from 24.12.66. The facts leading to this dismissal from service are narrated in para 4 of the petition; but it is not necessary to go into the details therein in view of the contentions in the O.P. This dismissal from service illegal and void in law according to the petitioner was questioned in a suit which the petitioner filed before the Munsiff Court. Payyoli wherein a declaration that the order of dismissal is void and that he should be retained in his status as

an employee of the Society was prayed for. The suit was transferred to the Sub-Court, Badagara and stood posted for trial, when the plaint was returned on objection raised by the Society that the suit in a civil Court is not maintainable and that the petitioner has to seek his remedy u/s 69 of the Act before the first respondent-the Deputy Registrar of Co-operative Societies. The plaint was accordingly re-presented before the first respondent as one u/s 69 of the Act. However, on a preliminary objection raised by the Society the first respondent held that proceedings u/s 69 of the Act will not lie in this matter and the proper and competent authority which the petitioner could approach for redress of his grievances as prayed for is the Industrial Court under the Industrial Disputes Act. Therefore, the unit was dismissed by the first respondent. Exhibit P2 is the order of dismissal as marked in this proceedings and the petitioner seeks for a writ of certiorari for quashing this order.

3. The questions raised by the petitioner in this O.P. are :

(i) Reliefs which the petitioner had sought before the first respondent are of such nature which a civil Court could grant in a properly framed suit and, therefore, the first respondent could have certainly entertained the suit.

(ii) The Co-operative Societies Act is a special enactment so far as the Co-operative Societies are concerned and all disputes of the nature specified in Section 69 have to be adjudicated by the authority constituted under that Act. The Industrial Disputes Act is a general law so far as employer-employee relationship is concerned and has to give way to special law, namely, the co-operative Societies Act, so far as employees of Co-operative Societies are concerned.

(iii) The order of dismissal is void and the petitioner retains his status as an employee under the Society. There is no necessity to set aside the order of dismissal and hence also for a direction for reinstatement. The petitioner's prayer is for arrears of salary and allowances, which a civil Court and hence the first respondent, would be competent to grant.

4. These contention strongly pressed before me by Mr. T.L. Viswanatha Iyer, learned Counsel for the petitioner are unsustainable in view of the various decisions of the Supreme Court and of this Court on the matter. In considering these contentions we have first to see what are the reliefs that the petitioner sought before the first respondent. The prayer in Ext P 1, the plaint before the first respondent is in these terms:

(a) The plaintiff, therefore, prays for a declaration that the order of dismissal dated 2.1.1968 is void and plaintiff retains his status as employee of the defendant-Bank with all rights regarding his emoluments and promotions unaffected.

(b) For a decree for above arrears of salary and all allowance against the defendant. Bank and all its officials with costs of this action, and

(c) For such other reliefs which in law and equity this Court may be pleased to grant and plaintiff is entitled.

Though no doubt reinstatement in service as such is not asked for, the relief sought in the declaratory form of the order being void, is in effect and substance a prayer for being reinstated in service, such reinstatement bring from the date of dismissal itself. In deciding the maintainability of the proceedings, one has to look into the actual substance of the matter and not the form in which the relief is asked for. What would be the effect of granting the relief prayed for. It would be tantamount to directing reinstatement of petitioner in service.

5. Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service even though by so doing the States in effect forced to continue to employ the servant whom it does not desire to employ. Similarly, under the industrial law jurisdictions of the labour and Industrial Tribunals to compel the employer to employ a worker whom he does not desire to employ is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to.

6. On the above principle of law, stated with clarity and precision, if I may so with respect by Mr. Justice Shah, as he then was, in *Ajay Kumar Minz Vs. State of Bihar and Others*, if one examines the present case, it would be found that facts of the case do not attract the exceptions. The jurisdiction of the civil Court is restricted by the provision in the Specific Relief Act which prevents the Court from compelling an employer to take back in service an employee whom he does not like to retain in service.

7. The principles laid down in the aforementioned Supreme Court case were reiterated in *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, . There overruling a decision of the Allahabad High Court holding that the order passed against an employee by the Warehousing Corporation dismissing him from service is null and void and he is entitled to reinstatement, the Supreme Court observed that the exceptions referred to in Justice Shah's judgment will not be attracted even in a case where the dismissal is in violation of a regulation made under the power reserved to the Warehousing Corporation u/s 54 of the Agricultural Produce (Development and Warehousing) Corporation Act, 1956. The Court was of the view that the violation of the regulation concerned would not amount to breach of a mandatory provision in the Act resulting in the order being declared as void or ultra vires but such non-compliance will result, at the most, in the order of dismissal being wrongful attracting the normal rule in such matters of making the appellant liable for

damages.

8. In *Indian Airlines Corporation Vs. Sukhdeo Rai*, the Supreme Court considered the question whether an employee of the Indian Airlines Corporation dismissed in contravention of the Regulations made under the Air Corporation Act, 1953 can get a declaration from the civil Court that the dismissal is null and void. Thereafter consideration of the scheme of the Air Corporation Act, the Court said that the employment of the person concerned not being one to an office or status and there being no obligation or restriction in the Act or the Rules subject to which only the power to terminate his employment, could be exercised, the person cannot contend that he was entitled to a declaration that termination of his employment was null and void. The Court said:

It is well-settled principle that when there is a purported termination of a contract of service, a declaration, that the contract of service still subsisted, would not be made in the absence of special circumstances because of the principle that Courts do not ordinarily grant specific performance of service. This is so, even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between the person appointed and the employer would in such cases be contractual, i.e., as between a master and servant, and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined (see *A. Francis v. Municipal Councillors of Kuala Lumpur*) [1962] 3 All E.R. 633 and *Barber v. Manchester Regional Hospital Board* [1958] 1 All E.R. 322.

9. The law relating to dismissal of a servant was again examined in detail in the well-known case of *Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, and the principles underlying are summarised by Ray, J. (as he then was) in the following words (at page 857):

The cases of dismissal of a servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a cause of contract of employment would be indirectly an instance of specific performance of contract for personal service. Such a declaration is not permissible under the law of Specific Relief Act.

The second type of cases of master and servant arises under Industrial law. Under that branch or law a servant who is wrongfully dismissed may be reinstated. This is special provision under Industrial law This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

The third category of cases of master and servant arises in regard to the servant

in the employment of the State or of other public or local authorities or bodies created under statute.

Termination or dismissal of what is described as a pure contract of master and the servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. In the case of servant of the State or of local authorities or statutory bodies. Courts have declared in appropriate case the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statutes. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies.

The Courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authorities dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the Courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is it is distinguished from private employment in pure cases of master and servant.

(underlining is mine)

10. In this case the society is neither an organ of the State nor is it a public authority in the proper sense of the term. The relation of the petitions vis-a-vis the society is a pure case of master and servant in private employment. Therefore, it is not possible for a civil Court to grant the reliefs prayed for by the petitioner.

11. I am certainly aware of the recent trends in English Law where great Judges are making a conscious attempt to depart from the old settled notions in the law of master and servant, part of the common law. The attempts are in the direction of giving greater rights to employees even outside Industrial Law so as to bring the common law more in consonance with social justice in its present concept in industrial society to take the law out of its moorings in feudalism. I might in this content quote the following passages from the Judgment of Lord Denning M.R. in the decision of the Court of Appeal (Lord Denning, M.R. Sachs and Stamp, L.J.) in *Hill v. C.A Parsons & Co., Ltd.* [1971] 3 W.L.R. 994. The learned Judge says (at pages 999 to 1001:

In the letter of July 30. 1971, the company purported to terminate Mr. Hill's employment by giving one month's notice. They had no power to do any such thing. In order to terminate his employment, they would have to give reasonable notice. I should have thought that, for a professional man of his standing and, I may add, his length of service, reasonable notice would be at least six months, and may be 12 months At any rate, one month is far too short.

Then comes the important question: what is the effect of an invalid notice to

terminate? Suppose the master gives the servant only one month's notice when he is entitled to six? What is the consequence in law? It seems to me that if a master serves on his servant a notice to terminate his service, and that notice is too short because it is not in accordance with the contract, then it is not in law effective to terminate the contract-unless, of course, the servant accepts it. It is no more effective than an invalid notice to quit. Just as a notice to quit which is too short does not terminate a tenancy, so a notice which is too short does not terminate a contract of employment.

Test it this way : take master and servant? Who are on perfectly good terms with complete confidence in one another. The master decides reluctantly to give the servant notice, but is too short. The servant can go at once to his master and say : This is no good : I am entitled to six months notice. The master, if he is a law-abiding citizen, will look at the contract or take legal advice. He will then say to the servant : You are quite right. It is too short. Pay no regard to it. I will give you notice of proper length and you can work out your time." In that case the contract clearly continues.

If the servant is entitled thus to put the master right-by telling him the notice is bad surely the Court can do so also. It can say to the master : Your notice is too short. It does not terminate the contract of employment. You must not act on it." The matter, if he is wise, will obey this injunction. The contract of employment will not terminate on the named day, but will continue until determined by a notice of proper length.

V. Suppose the Master insists on the named day:

Suppose, however, that the master insists on the employment terminating on the named day? What is the consequence in law? In the ordinary course of things, the relationship of master and servant thereupon comes to an end : for it is inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties thereto. As Viscount Kilmuir, L.C. said in *Vine v. National Dock Labour Board* [1957] A.C. 488 referring it p. 500 to the ordinary master and servant case : if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract" Accordingly, the servant cannot claim specific performance of the contract of employment. Nor can he claim wages as such after the relationship has been determined. He is left to his remedy in damages against the master for breach of the contract to continue the relationship for the contractual period. He gets damages for the time he would have served if he had been given proper notice, less, of course, anything he has, or ought to have earned, in alternative employment. He does not get damages for the loss of expected benefits to which he had no contractual right : see *Lavarack v. Woods of Colchester Ltd.* [1967] 1 Q.B 278.

I would emphasise, however, that that is the consequence in the ordinary course of things. The rule is not inflexible It permits of exceptions. The Court can in a

proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end. That was clearly the view of the Privy Council in the latest case on the subject, *Francis v. Kuala Lumpur Councillors* [1962] 1 W.L.R. 1411, where Lord Morris of Borth-y-Gest said at pp. 1417, 1418:

When there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will rarely be made" adding that "Special circumstances will be required before such a declaration is made".

Let me give an example taken from the decided cases. Suppose that a senior servant has a service agreement with a company under which he is employed for five years certain-and, in return, so long as he is in the service, he is entitled to a free house and coal-and at the end to a pension from a pension fund to which he and his employers have contributed. Now, suppose that, when there is only six months to go, the company, without any justification or excuse, gives him notice to terminate his service at the end of three months. I think it plain that the Court would grant an injunction restraining the company from treating the notice as terminating his service. If the company did not want him to come to work, the Court would not order the company to give him work. But so long as he was ready and willing to serve the company, whenever they required his services the Court would order the company to do their part of the agreement, that is, allow him his free house and coal and enable him to qualify for the pension fund. I take this illustration from the casts of *Ball v. Coggs* [1970] 1 Bro. Parl. Cas. 140; *East Indian Company v. Vincent* [1740] 2 Atk. 82; *Cuckson v. Stones* [1858] 1 B & B 248 and *Warburton v. Coperative Wholesale Society Ltd.* [1917] 1 K.B. 661

It may be said that, by granting an injunction in such a case, the Court is indirectly enforcing specifically a contract for personal services. So be it. Lord St. Leonards did something like it in *Lumley v. Wagnor* [1852] 1 De G.M. & G. 604. And I see no reason why we should not do it here.

However healthy this approach might be, the Indian Courts are tied by the relevant provision in the Specific Relief Act. In any view of the matter the Supreme Court has made a positive enunciation of the law on the subject which has, therefore, to be applied to the case.

11. If the civil Court cannot grant the relief to the petitioner, then the first respondent also cannot. The arbitration provided in Section 69 of the Act is only an alternative to the normal processes of the ordinary Courts. The disputes contemplated in Section 69 of the Act are disputes of a nature which could have been decided by civil Court but for that provision. The power that could be exercised by an Industrial or Labour Court under the Industrial Disputes Act cannot be exercised by the Registrar, As Govindan Nair, J., (as he then was) speaking for a Division Bench pointed out in *Kaloor Vadakumarry Service*

Coroperative Society Ltd. v. Asst. Registrar Mukundapuram (1973) KLT 523:

The Industrial Disputes Act is meant for doing social justice and the powers conferred on the Industrial Tribunals and Labour Courts functioning under that statute are very much wider. Those Tribunals and Labour Courts are not trammelled by the inhibitions of contractual obligations or rights and can, in disregard of well-known concepts of law, readjust rights and obligations in a manner conceived to be just in the light of socio-economic changes that are taking place in various countries in this century. The jurisdiction exercised by such Tribunals and Labour Courts is, therefore, entirely different and though as was observed by the Judicial Committee, there may be said to be a "lis" and though there may be a judicial process involved, they do not function as Courts nor do they exercise powers of a Court or are they inhibited by rules of law which must guide and control the decision; of Courts A dispute can be raised by a body of workmen and this can be done even against the wishes and will of the concerned workman. In such a dispute between the body of workman and the employer the aggrieved employee is often out of the picture or at least not necessarily in the picture. Such a dispute and the adjustment of rights arising therefrom cannot fall within the disputes in the definition in Section 2(i) of the Act and, therefore, will not fall within Section 69 or the Act. This is so, we think notwithstanding Rule 6 of the rules framed u/s 109 of the Act, the Kerala Cooperative Societies Act, 1969, by which the Registrar is required to act according to justice, equity and good conscience. The Registrar has not the power of an Industrial Court, he himself acts, as is pointed out by this Court in Kerala State Handloom Weaver's Co-operative Society Ltd. v. State of Kerala and Ors. reported in 1964 K.L.J. 175, in the manner in which a Court should function.

12. Therefore, the first respondent was quite right in passing Ext. P 2 order. The O.P. is, therefore, dismissed, but in the circumstances of the case without costs.