

(1996) 02 MAD CK 0118
In the Madras High Court
Case No : S.A. No. 1130 of 1995

Somasundaram

APPELLANT

Vs

Liyakat Ali and another

RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Industrial Disputes Act, 1947 — Section 2, 2A, 33C

Citation : (1997) 1 CTC 4

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; D. Sivakumar and R. Senniappan, for the Respondent

Judgement

1. This second appeal is by the second defendant in O.S. No. 348 of 1988, on the file of the District Munsif's Court, Namakkal. First defendant is the Special Officer, Pandamangalam Primary Co-operative Bank Limited (Second respondent herein) and plaintiff is the first respondent herein.
2. For the sake of convenience, the parties are referred to in this judgment according to the array of parties in the suit.
3. Plaintiff filed the above suit for a declaration that the second defendant is junior to him and also for a declaration that the resolution passed by the first defendant on September 3, 1987 appointing the second defendant as Senior Clerk is illegal, incompetent and without jurisdiction.
4. Material averments in the plaint are the plaintiff joined as Clerk on May 1, 1976. Initially the appointment was temporary. But his appointment was regularised from September 1, 1976. The second defendant was appointed 25 on November 9, 1976 in a regular vacancy. Before November 9, 1976, the second defendant was working as a clerk in another co-operative society unconnected with the first defendant. By proceedings of the first defendant, he declared the

second defendant as senior to plaintiff, and he has been designated as senior clerk, taking into consideration only the alleged seniority. The same was challenged before the Authorities, but it was of no avail. It is alleged by the plaintiff that the order superseding his claim of seniority is illegal and improper. He said that the civil suit is maintainable for getting such a declaration.

5. The second defendant contended that the action of the Registrar, declaring him as senior to plaintiff is correct. He also said that even before November 9, 1976 he was working as clerk in another society and that service was also taken into consideration by the Registrar for reckoning his seniority. According to him, usually the same is proper. It is further said that the suit is not maintainable, before civil Court, and, therefore, liable to be dismissed with costs.

6. Trial Court, after taking into consideration the evidence, both oral and documentary, came to the conclusion that the order of the first defendant declaring the second defendant as senior is against the well-settled principles of service jurisprudence. According to the trial Court, second defendant joined the first defendant only long after the plaintiff was appointed and regularised, for the purpose of seniority, the same alone has to be considered and, therefore, the suit was decreed as prayed for.

7. When the matter was taken in appeal, lower appellate Court also concurred with the same finding. The appeal was dismissed. It is against the concurrent decisions of both the Courts, below, second defendant has preferred this second appeal.

8. At the time of admission of the second appeal the following substantial question of law was framed for consideration :

"Whether the judgment of the Courts below in holding that the suit is maintainable in a civil Court is not against Section 156 of the Co-operative Societies Act ?"

9. At the time of argument, learned counsel for the appellant did not seriously challenge the factual findings entered by the Courts, below, i.e., the inter se seniority between the plaintiff and the second defendant. According to me, the conclusion arrived at by the Courts below is correct, seniority is always reckoned by length of service only. In this case, plaintiff was appointed long before the second defendant was appointed in the Society. Service in a different society cannot be taken into consideration for considering the inter se seniority between them. Therefore, I am of the view, that the findings of the Courts below are right.

10. Learned counsel for the appellant contended that the suit is not maintainable. According to him, plaintiff ought to have moved either under the provisions of the Co-operative Societies Act or under the Industrial Disputes Act. A civil suit, according to him, is barred u/s 9 of the Code of Civil Procedure. Section 9, C.P.C. says that Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly

barred.

11. In Sir John Woodroffee and Ameer Ali's CPC - 3rd Edition (1987) - Vol. 1, at page 109, the learned Authors have said thus :

"Suits of a civil nature - "Civil nature" means such rights as are vested in the citizen, and fall within the domain of private, and not of public law, where there is a civil right there is a civil remedy."

12. Recently, our Supreme Court had occasion to consider the same in Most. Rev. P.M.A. Metropolitan and others, etc. etc. Vs. Moran Mar Marthoma and another etc. etc., . Paragraphs 27 and 28 of the said judgment may usefully be extracted :

"To begin with the objection to the maintainability of the suit under Sec. 9 of the CPC was probably not raised in 1954 and 1959 and if raised was not pressed. But that by itself may not preclude defendant-appellant from raising it, even in this Court as the bar or lack of jurisdiction can be entertained, at any stage, since an order or decree passed without jurisdiction is non est in law. What then is the scope of the Section ? Does it comprehend suits for declaration that the Syrian Churches are episcopal ? Could the respondent-plaintiff claim, declaration that Malankara Association had become autocephalous and no priest could refuse to recognise the authority of the Catholic ? Could the plaintiff seek injunction, restraining the priests or Deacon from performing any other Sacramental services and prohibit the defendants from interfering with the administration of the Malankara Church ? How would the bar of jurisdiction operate if only part of relief is cognizable ? To appreciate these aspects it is necessary to set out the Section itself and examine its scope and then advert to facts."

9. Courts to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained), have jurisdiction to try all suits of a Civil nature excepting suits of which their cognizance is either expressly or impliedly barred,

"Explanation I - A suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision of question as to religious rites or ceremonies.

Explanation II - For the purposes of this Section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

"One of the basic principles of law is that every right, has a remedy. Ubi Jus ibi remedium is the well known maxim. Every civil suit is cognizable unless it is barred, there is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue Smt. Ganga Bai Vs. Vijay Kumar and Others, . The expansive nature of the Section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two

explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders nugatory. The heading which is normally key to the Section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the Section by use of the word "shall" and the expression, "all suits of a civil nature" unless "expressly or impliedly barred."

"Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement of right. The word "shall" makes it mandatory. No Court can refuse to entertain a suit if it is of description mentioned in the Section. That is amplified by use of expression, "all suits of civil nature". The word "civil" according to dictionary means, "relating to the citizen as an individual; Civil rights. In Black's Legal Dictionary it is defined as, "relating to provide rights and remedies sought by civil actions as contrasted with criminal proceeding"s. In law it is understood as an antonym of Criminal. Historically the two broad classifications were Civil and Criminal. Revenue, tax and company, etc. were added to it later. But they too pertain to the larger family of "Civil". There is thus no doubt about the width of the word "Civil". Its width has been stretched further by using the word "nature" along with it. That is even those suits are Cognizable which are not only civil but are even of civil nature. In Article 133 of the Constitution an appeal lies to this Court against any judgment, decision or order in a Civil proceedings". The expression came for construction in S.A.L. Narayan Row and Another Vs. Ishwarlal Bhagwandas and Another, . The Constitution Bench held a proceedings, for relief against infringement of civil right of a person in a civil proceedings. "In Arbind Kumar Singh Vs. Nand Kishore Prasad and Others, , it was held to extend to all proceedings which directly affect civil rights". The dictionary meaning of the word "proceedings" is "the institution of a legal action", "any step taken in a legal action. In Black's Law Dictionary it is explained as. "In a general sense, the form and manner of conducting juridical business before a Court or a judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of Judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like."

"The word "nature" has been defined as, the fundamental qualities of a person or thing, identity or essential character, sort; kind; character"s. It is thus wider in content. The word civil nature is wider than the word "Civil Proceedings". The section would therefore, be available in every case where the dispute has the characteristics of affecting one"s rights which are not only civil but of civil nature."

13. Section 34 of the Special Relief Act says that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff in such suit need not ask for any further relief.

14. In *Vemaredd Ramaraghiava Reddy & others v. Kondru Seshu Reddy and others* 1967 (1) S.C.W.R. 141, their Lordships have said that Section 42 of the (old) Specific Relief Act, 1877 (Corresponding to Section 34 of the present Act) is not exhaustive, and in cases where Section 42 is not applicable, relief could be granted u/s 9 of the Code of Civil Procedure. That was a case where the plaintiff asked for a declaration that a compromise decree is not binding on the deity. It was held thus :-

"The injury complained of was that the Court has by recording the compromise, in O.P. No. 3 of 1950 depraved the deity of its present title to certain trust property. The relief which the plaintiff seeks is for a declaration that the compromise decree was null and void and if such a declaration is granted the deity will be restored to its present rights in the trust properties. A declaration of this character namely that the compromise decree is not binding upon the deity is itself a substantial relief and has immediate coercive effect. A declaration of this kind was the subject matter of appeal in *Fischer v. Secretary of State for India in Council* and falling outside, the purview of Sec. 42 Specific Relief Act and will be governed by the general provisions of the C.P.C. like Section 9 or Order 7, Rule 7."

15. It can't be disputed that the relief claimed in the plaint is of civil nature. It affects the career prospects of the plaintiff.

16. Even if the suit is of Civil nature, contention of the learned counsel for the appellant is that the remedy is only through Co-operative Societies Act or Industrial Disputes Act. Learned counsel further submitted that u/s 156 of the Tamil Nadu Co-operative Societies Act, 1983, the suit is not maintainable, for, the Orders passed by the Registrar or Authorities under the said Act are considered to be done in good faith. A reading of Section 156 of the said Act reads thus :-

"156. Bar of jurisdiction of civil Courts-Notwithstanding anything contained in any other law for the time being in force on order or award passed, decision or action taken or direction issued under this Act by an arbitrator, a liquidator, the Registrar or an officer authorised or empowered by him, the Tribunal or the Government or any Officer subordinate to them, shall be liable to be called in question in any Court and no injunction shall be granted by any Court in respect of anything which is done or intended to be done by or under this Act."

A reading of the above section makes it clear that to get protection under that Act, the Authorities under that Act must pass order or award for which they are empowered under the Act. It is only those powers which they are asked to do under that Act and impounded from Civil Action, cannot be called in question in a

civil suit. I asked learned counsel for the appellant whether the Registrar has got jurisdiction to decide the inter se seniority between the two employees. He was not in a position to show me the provision of law regarding the same. He brought to my notice various Rules framed under the Co-operative Societies Act. But they are not concerned with dispute as regards inter se seniority between two employees. The powers given to the Registrar are only of disciplinary character, where he can withhold promotion, etc. Admittedly, this is not a case of disciplinary proceedings. Once it is found that the Registrar was not acting under any provisions of the Act, he has to decide the inter se seniority only in accordance with law. It is a common law right. Hence, the bar u/s 156 of the Co-operative Societies Act has no application to the facts of this case. Further, if the inter se seniority can't be decided under the Act, it cannot be said that any decision by the Registrar is also in good faith. The powers of the Registrar and the Authorities under the Act are provided in that statute, and they should exercise the powers in accordance with the same, and they cannot go beyond that. Any power exercised beyond the statute cannot be said to be in good faith. For that reason also, the power u/s 156 of the Act has no application.

17. Learned counsel then submitted that the suit is barred under the Industrial Disputes Act. This contention is not raised anywhere in the written statement, nor was it raised before the Courts below. But it being a question of law, I said that he is at liberty to substantiate the same if he so desires.

18. Industrial dispute, has been defined u/s 2(k) of the Industrial Disputes Act. A reading of the said Section makes it clear that an individual grievance against the employer cannot be an industrial dispute unless a community of interest is established, or the cause is taken by a Union or other employees. If the workmen have no direct or substantial interest in the employment or non-employment of a person or in his term of employment or his conditions of labour, then an industrial dispute cannot arise with regard to such person. In "Law on Industrial Disputes" by Vithalbhai B. Patel - Third Edition (1984) Volume 1 the learned Author has said thus at page 251. He has further said as follows in the same page :-

"Whether such direct or substantial interest has been established in a particular case will depend on its facts and circumstances. The crucial test is one of community of interest, and the person regarding whom the dispute is raised must be one in whose employment, non-employment, terms of employment or the conditions of labour the parties to the dispute have a direct or substantial interest. To bring the dispute within the scope of the definition, it is necessary that it should be supported by appreciable number of workmen employed under the same employer.

Community of interest in this connection does not mean that the status and conditions of service of workman whose cause is espoused by other workmen must be similar to those of latter. It would be sufficient if the person was in employment and was a workman as defined by the Act in the same concern.

19. P. R. Bagri, in Law of Industrial Disputes-Second Edition (1983) Volume I, has stated at page 95 thus :-

"The law has, however, since been amended by the amending Act 35 of 1965 by the addition of Section 2A to the Act providing that 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 workman is a party to the dispute. To the limited extent provided in Section 2A, an individual dispute is now an industrial dispute but in all other respects such a dispute is still not an industrial dispute."

An Exception to an individual dispute can be industrial dispute is provided under the Amendment to the Act, whereby Section 2A has been incorporated. That relates to the dismissal, discharge, retrenchment or otherwise termination of an individual employee. Only in those cases, the question of an individual dispute becomes, an industrial dispute. The inter se seniority between the plaintiff and the second defendant is purely an individual dispute, in which the other employees are not concerned. It is only a dispute between the plaintiff and the second defendant regarding their future prospects in their service career. In that view of the matter, the contention of the learned counsel for the appellant has to fail.

20. In *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, their Lordships considered in detail the scope of Section 9 of the CPC and also the jurisdiction of the civil Court to entertain a labour dispute. In that decision that law was summarized thus :

"The principles applicable to the jurisdiction of the civil Court in relation to an industrial dispute may be stated thus :

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the Civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates, to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter V-A then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be.

In relation to Principle No.2 there will hardly be a dispute which will be an industrial dispute within the meaning of Section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Civil Courts, therefore, will have hardly an occasion to deal with the type of cases falling under Principle No. 2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by Principle No. 3 stated above."

The said decision was followed by the supreme Court again in Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, . In paragraph 32 of the said decision, the entire law has been summarised and it has been held thus :

"We may now summarise the principles flowing from the above discussion;

(1) Where the dispute arises from general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in Civil Court cannot be said to be not maintainable, even though such a dispute may also constitute an "Industrial dispute" within the meaning of Section 2(k) or Section 2A of the Industrial Disputes Act, 1947.

(2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment (Standing Orders) Act, 1946 which can be called "sister enactments to Industrial Disputes Act and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2A of Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to Civil Court is open.

(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex-facie. The power conferred is the power to refer and not the power to decide though it may be that the Government is entitled to examine whether the dispute is ex-facie frivolous, not meriting an adjudication.

(5) Consistent with the policy of law aforesaid we commend to the Parliament and the State Legislatures to make a provision enabling a workman to approach

the Labour Court/Industrial Tribunal directly, i.e., without the requirement of a reference by the Government in case of industrial disputes covered by Section 2A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to statutory provisions. Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created Industrial Disputes Act or the Civil out where recourse to Civil Court is open according to the principles indicated therein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to Civil Courts. Indeed, the powers of the Courts, and Tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate the circumstances for putting an end to an industrial dispute."

21. The Supreme Court has decided a similar question in the decision reported in 1995 Supp. (1) SCC 144, State of Haryana v. Randhir Singh and Ors. . There, the question was, s penalty of withholding of increments, and a civil suit in connection therewith could be maintained. It was held thus :

"In appeal, the Additional District Judge has to recorded a finding that the case set out in the plaint was not based on Section 2A of the Industrial Disputes Act or on the language of the Standing Orders but was essentially based on the provisions contained in the is 1952 Rules and, therefore, the rights and liabilities arose under Common law" and would attract Principle No. 2 of the Premier Automobiles judgment. In the absence of anything to show to the contrary, the High Court was right in not interfering with the order passed by the lower appellate Court and there is no reason for interference by the Supreme Court either under Article 136 of the Constitution."

22. Once it is held that the suit is of a civil nature and the provisions of the Co-operative Societies Act or Industrial Disputes Act have no application to the facts of the case, the concurrent findings of the Courts below have only to be confirmed, especially on the merits of the case, the appellant has nothing to urge against the concurrent findings of the Courts below.

23. In the result the substantial question of law is found against the appellant. The second appeal is dismissed with costs.