
(1985) 01 RAJ CK 0033
In the Rajasthan High Court
Case No : Civil Special Appeal No. 274 of 1984

Sonraj	Vs	APPELLANT
Ram Kishore and Another		RESPONDENT

Date of Decision : 15-01-1985

Acts Referred:

Constitution of India, 1950 — Article 213, 226, 227

Citation : (1985) RLW 249 : (1985) 1 WLN 633

Hon'ble Judges : S.N. Bhargava, J; S.K. Mal Lodha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.K. Mal Lodha, J.—Against the order dated July 19, 1984, the appellant who was petitioner in a petition under Articles 226 and 227 of the Constitution and whose writ petition was dismissed by the learned single Judge, has filed this appeal u/s 18 of the Rajasthan High Court Ordinance, 1949.

2. The petitioner-appellant carries on business in cloth in the name and style of M/s Sonraj Gautam Raj at Jodhpur and he is the employer and respondent No. 1, who was non-petitioner No. 1 in the writ petition, was employed by him on August 10, 1973. The appellant and respondent No. 1 will here in after referred to as "the petitioner and non-petitioner No. 1" respectively. The case of non-petitioner No. 1 in the complaint that was filed u/s 28 A of the Rajasthan Shops and Commercial Establishments Act, 1958 (Act No. XXXI of 1958) (for short "the Act") was that the petitioner had discharged him from employment without any reasonable cause and without notice on June 2, 1974. According to non-petitioner No. 1, it was necessary for the petitioner to serve him with a notice or to pay him one month's wages and as this was not done, the discharge from employment was illegal. It was also stated by non-petitioner No. 1 in the complaint that no misconduct was alleged against him. The complaint is undated. It was addressed to the Authority appointed under the Rajasthan Shops and Commercial Establishments Act, 1958 at Jodhpur. It was registered as Case No. 3

of 1974. It was prayed that the petitioner may be directed to re-instate him in service together with back wages and costs of the complaint. The notice was served on the petitioner for filing reply to the complaint. The reply was filed and it was, inter alia, contended that non-petitioner No. 1 had left the services of the petitioner of his own accord and despite calling him, he did not turn upto join duty. The authority, on the basis of the complaint and the reply, framed five issues inclusive of the relief. The Authority by its order Annexure-1 dated August 27, 1977 came to the conclusion that non-petitioner No. 1 was discharged from service with effect from June 2, 1974 and that there was non-compliance of the provisions Section 28A of the Act and thus, the discharge of non-petitioner No. 1 was illegal. It, therefore, directed that non-petitioner No. 1 should be re-instated with full back wages. Being dissatisfied with the order Annexure-1 dated August 27, 1977, the petitioner filed the writ petition under Articles 226 and 227 of the Constitution praying that respondent No. 2 Shri K.K. Tiwari, Authority under Shops and Commercial Establishments Act, Jodhpur who was non-petitioner No. 2 in the writ petition had no authority to entertain, hear and decide the complaint of non-petitioner No. 1 u/s 28A of the Act as he was not the Prescribed Authority under the Act. It was also submitted that for making complaint, no manner has been prescribed under the Rules. On these premises it was contended in the writ petition that the order Annexure-1 dt. August 27, 1977 of non-petitioner No. 2 is without jurisdiction and it is void and it should be quashed. The writ petition was contested by non-petitioner No. 1 by filing a reply. It was, amongst others, averred that the petitioner had not raised the point of jurisdiction at any stage of the enquiry of the complaint before non-petitioner No. 2 and so, it will be deemed to have waived this objection and has acquiesced in the matter. Further that, by his conduct, he has disentitled himself to raise this objection before the Court.

3. Before the learned single Judge, three contentions were raised by the petitioner:

- (1) that non-petitioner No. 2 was not an authority prescribed under the Act and, therefore, the order is of no consequence;
- (2) that as no provisions have been made or procedure laid down, the Authority had no jurisdiction to enquire into the complaint and grant the relief;
- (3) that there was no retrenchment/discharge from employment at all so as to warrant action u/s 28A of the Act.

After considering the submissions that were advanced by the learned Counsel appearing for the parties, the learned single Judge has recorded the following findings:

- (1) that the State Government's power to appoint the prescribed authority is derived from the Act itself and so, it cannot be said that the prescribed authority had no jurisdiction to hear the complaint of non-petitioner No. 1; and that admittedly u/s 28A(2) of the Act, the State Govt. had appointed respondent No.

2 as the Authority under the Act;

(2) that it is not correct that no provision has been made or procedure laid down for making and hearing of the complaint;

(3) that there was retrenchment within the meaning of the Act by the petitioner in as much as he did not allow non-petitioner No. 1 to work at his shop.

In view of the aforesaid findings, the learned single Judge dismissed the writ petition and discharged the rule.

4. Being dis-satisfied, the petitioner-appellant has filed this appeal as aforesaid.

5. We have heard Mr. M.M. Vyas learned Counsel for the appellant and Mr. M.R. Singhvi, learned Counsel for respondent No. 1. Mr. R.C. Maheshwari, learned Additional Government Advocate has supported the order under appeal and adopted the arguments that were raised by Mr. M.R. Singhvi, learned Counsel for the respondent No. 1.

6. Mr. M.M. Vyas learned Counsel for the appellant has pressed for our consideration, in the first instance, that the learned single Judge went wrong in holding that respondent No. 2 is the Prescribed Authority under the Act so as to entertain, hear and decide the complaint u/s 28-A of the Act filed by non-petitioner No. 1, as according to him, respondent No. 2 was not appointed as the Authority under the Act by the Rules as contemplated by Section 28-A of Act. According to him, the Authority envisaged u/s 28-A(2) of the Act means the Authority which has been prescribed by the Rules to be framed under the Act. The crux of the argument of the learned Counsel for the appellant is that the Authority which has passed the order Annexure-1 dated August 27, 1977 lacked inherent jurisdiction to entertain, hear and decide the complaint u/s 28-A of the Act. This submission of the learned Counsel for the appellant is strongly resisted by Mr. M.R. Singhvi, learned Counsel for respondent No. 1 on two counts (i) that the State Govt. has appointed respondent No. 2 as the Prescribed Authority by means of the Notification issued by it which will be referred here in at the appropriate place. According to him, the Authority appointed by the Notification was the Prescribed Authority u/s 28-A(2) of the Act; and (ii) that in the reply which was filed by the petitioner objection regarding want of jurisdiction of respondent No. 2 was not taken and not only that, at any stage during the enquiry of the complaint, this objection until the decision by respondent No. 2 was not raised and, therefore, it will be deemed to have been waived and abandoned and so, in these circumstances, this objection could not be taken by him in the writ petition. In this view of the matter, according to the learned Counsel for non-petitioner No. 1, the plea of want of jurisdiction is nor available to the petitioner. In support of his submissions. Mr. M.R. Singhvi, learned Counsel for non-petitioner No. 1 has invited our attention to *Jhunjhunu Kendriya Sahakari Bank Ltd. v. The State of Rajasthan* and Ors. 1975 SLJ 471, *Shivlal v. State of Rajasthan* RLW 1976 391, *Municipal Board, Merta v. The Labour Commissioner* RLW 1976 430, *M/s Nehru Motor T. Co.'s Ltd. v. Dy. Reg. Co.'s* RLW 1977 136 ,

Gandharb Sain Vs. Additional District Development Officer, Sriganganagar and Others, and Sohan Singh and Others Vs. General Manager, Ordnance Factory, Khamaria, Jabalpur and Others,

7. We have given most anxious and thoughtful consideration to the rival contentions of the learned Counsel appearing for the parties.

8. It may be stated that Section 28A occurs in Chapter VI-A and the whole of the section was inserted by (Raj. Act II of 1972) Vide Notification No. F. 7(25) Vidhi 70 dated March 17, 1972 published in Rajasthan Gazette Extra Ordinary Part IV-A, dated March 17, 1972. It will profitable here to consider the definition of "Prescribed Authority" in the Act. Section 2(14) of the Act defines the Prescribed Authority" to mean the authority prescribed by rules made under the Act. Section 40 deals with power to make rules. The material portion of Section 40 for the present purpose reads as under:

40. Power to make rules: (I) The State Government may, by notification in the Official Gazette, make rules for the purpose of carrying into effect the provisions of this Act

(2)... ..

(3)

4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

Now, we advert to Section 28 A of the Act under which, the complaint was filed by non-petitioner No. 1 against the petitioner. The material part of Section 28A of the Act is as under:

Section 28A. Notice of Dismissal or discharge by employer

(1)

(2) Every employee so dismissed or discharged may make a complaint in writing in the prescribed manner to a prescribed authority within 30 days of the receipt of the order of dismissal or discharge on one or more of the following grounds, namely:

(a) that there was no reasonable cause for dispensing with the service; or

(b) that no notice was served upon him as required by Sub-section (1); or

(c) that he had not been guilty of any mis-conduct: Provided that the prescribed authority may condone delay in filing such a complaint if it is satisfied that there was sufficient cause for not making the complaint within the prescribed time.

A complaint u/s 28A of the Act by an employee who has been dismissed or discharged has to be filed before a prescribed authority. That complaint has to be in writing in the prescribed manner. According to Section 2(14) of the Act, the

Prescribed Authority as envisaged by Section 28A(2) of the Act is the authority to be prescribed by the Rules which are to be framed u/s 40 of the Act. Section 40(4) of the Act makes abundantly clear that power to make rules conferred by Section 40 has been made subject to the condition of the rules being made after the previous publication. Here, it is necessary to examine two Notifications which have been relied on by Mr. M.R. Singhvi, learned Counsel for non-petitioner No. 1. The first Notification No. F. 1(11)(4) Lab./70, dated May 1, 1972 recites that in exercise of the powers conferred by Sub-section (2) of Section 28A of the Act, the State Government appoints the Officers mentioned there in to be the Authority before whom complaint can be made by the employee regarding his dismissal or discharge, for the local areas specified against each. At Item No. 3, there is a mention of the Regional Assistant Labour Commissioner, Jodhpur for the local areas Jodhpur, Jaisalmer, Pali, Barmer, Sirohi, Jalore and Nagaur Districts. The aforesaid Notification was published in Rajasthan Gazette Part I-A, dated July 13, 1972 at page 52. According to Mr. M.R. Singhvi, learned Counsel for non-petitioner No. 1, the State Government had appointed the prescribed authority by means of the aforesaid notification and this too, in exercise of the powers under Sub-section (2) of Section 28 A. of the Act. He has also referred to Notification No. P. 1(1) L & E dated January 11, 1974 by which the State Government in exercise of the powers conferred by Sub-section (2) of Section 28A of the Act in supersession of all previous notifications issued in respect, appointed the officers mentioned therein to be the authority before whom the complaint can be made by the employee regarding dismissal or discharge. At Item Number 4, Regional Deputy Labour Commissioner, Jodhpur has been specified as the Authority for the local areas Jodhpur, Jaisalmer, Pali, Barmer, Sirohi, Jalore and Nagaur Districts. On the basis of this notification, he submitted that there was a Prescribed Authority before him and non-petitioner No. 1 submitted his complaint u/s 28A of the Act. In these circumstances, the most important and pertinent question that arises is whether the Authority that has been appointed by the Notifications of 1972 or 1974 can be considered as the prescribed authority" under the Act for the purpose of Sub-section (2) of Section 28 A of the Act and further whether that meets with the requirements of Section 40(4) of the Act. We may pause here to notice Section 26 of Rajasthan General Clauses Act, 1955 (Raj. Act No. VIII of 1955) ("the Act of 1955" here in) which corresponds to Section 23 of the General Clauses Act, 1897(No. X of 1897). It reads as under:

Section 26. Provisions applicable to making of rules, etc. after previous publication.-Where by any Rajasthan law, a power to make rules, regulations or bye-law is expressed to be given subject to the conditions of the rules, regulations or bye-laws being made after previous publication, then unless such law otherwise provides, the following provisions shall apply, namely:

(1) the authority having power to make the rules, regulations of bye-laws, shall, before making them, publish a draft of the proposed rules, regulations or bye-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules, regulations or bye-laws, and, where the rules, regulations or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also shall consider any objection or suggestion which may be received by the authority having power to make the rules, regulations or bye-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Rajasthan Gazette of a rule, regulation or bye-laws purporting to have been made in exercise of a power to make rules, regulations or by-laws after previous publication shall be conclusive proof that the rule, regulations or bye-law has been duly made.

Section 32 of the Act of 1955 deals with definitions and according to Section 32(58), "Prescribed" means prescribed by rules made under any enactment. The two notifications relied on by the learned Counsel for non-petitioner No. 1, of course, purport to have been issued u/s 28A(2) of the Act. Section 22 of 1955 which course under the head "Provisions as to Notifications, Orders, Rules etc." made under enactments is as under:

Section 22. Construction of Notifications, Order, etc. issued or made under enactments: Where by any Rajasthan Law, a power to issue or make any notification, order, scheme, rule, regulations, form or bye-law is conferred, then the expressions used in the notification, order, scheme rule regulations form or bye-law shall unless there is anything repugnant in the subject or context have the same retrospective meanings as in the Rajasthan Law conferring the power.

Section 32(63) defines "Rajasthan Law" to mean and include as follows

(i) as respects any period on and after the seventh day of April, 1949-

(a) an Ordinance made and promulgated by Rajpramukh of Rajasthan in pursuance of the Covenant; or

(b) an Act made by him in exercise of the power conferred by Article 385 of the Constitution; or

(c) an Act so made with the assent of the President; or

(d) an Ordinance promulgated by Rajpramukh of Rajasthan under Article 213 of the Constitution; or

(e) an Act passed by the State Legislative Assembly which has received the assent of Rajpramukh or the President, as the case may require; and

(ii) as respects the period prior, to the said day-

(a) an Ordinance made and promulgated by the Rajpramukh of the former Rajasthan State or of the former Mataya State in pursuance of the Covenanting; or

(b) so far as may be any law made by the Ruler or a competent Legislature or other competent authority or officer of a Covenanting State.

Under Section 2(14) of the Act, the Authority has to be prescribed by the Rules made under the Act. Section 40(4) of the Act lays down that the power of making rules is subject to the condition of the rules being made after previous publication. Admittedly, the Authority has not been prescribed by the Rules framed under the Act. As such, there was no Authority prescribed by the Rules which could entertain, hear and decide the complaint. The Notifications relied on by Mr. M.R. Singhvi cannot be said to have been issued in exercise of the power conferred by the Act itself. The two notifications cannot be availed of in this connection.

9. This matter can be viewed from another angle also. If the contention of Mr. M.R. Singhvi, is accepted for argument's sake that the notifications have been issued under Sub-section (2) of Section 28A of Act, still the question is whether by virtue of these, the Authority has been prescribed by the Rules under the Act in accordance with Section 40(4) of the Act. In other words, we have to see whether there was compliance of Section 40(4) of the Act before issuing the notifications.

10. In this connection, we may refer to The Automobile Transport Rajasthan (Pr.), Ltd. and Others Vs. The State of Rajasthan and Others, wherein Section 23 of the General Clauses Act, 1897 came up for examination. It will be useful here to excerpt the following from para 6 of the report of that case:

Thus previous publication means-(1) the authority concerned must publish a draft of the proposed rules or bye-laws for the information of persons likely to be effected thereby;

(2) the manner of publication is left to the authority concerned unless it has been otherwise prescribed by the Government;

(3) alongwith the draft rules, a notice must also be published specifying a date on or after which the draft is to come up for consideration;

(4) the said authority must then consider any objections or suggestions which may have been received before the specified date; and (5) then after all these requirements have been fulfilled, the rules, or the bye-laws as the case may be, as finalised, must be published in the Official Gazette, and a certain presumption then arises that the rules or bye-laws have been duly made.

The Division Bench has summarised the legal position in para 22 of the report as under:

22 The correct legal position, therefore, in our opinion is that notwithstanding that the legislature may attribute finality to the decisions of sub-ordinate courts or tribunals or what is analogous, invest the final publication of certain statutory rule in the official gazette with the quality of conclusiveness of proof that the rules have been duly made in the sense already discussed the jurisdiction of this Court as a court of judicial review and as possessed of extensive writ jurisdiction under Article 226 of the Constitution cannot be taken away and where a proper or grave case is satisfactorily established that a decision is manifestly contrary to law or has been made wholly or partly in excess of jurisdiction or in flagrant disregard of judicial procedure, or the fundamental requirements of natural justice; or, again where certain statutory rules are made, (and they could have been made subject to previous publication only) by the Government or by any other authority in the exercise of a delegated authority, but they have been made in manifest and substantial breach of the statutory essentials thereof, then the rule of finality attributed to such fiats by the legislature cannot be accepted as barring the exercise of the powers of this Court under the Constitution to see whether the rules were lawfully made or not; and it would be its privilege, nay, bounden duty to go behind this facade of finality in either case and strike down the decision or the rules as the exigencies of the case may justly require. We hold accordingly.

Section 24 of the M.P. General Clauses Act, 1957 came up for consideration before their Lordships of the Supreme Court in Bhopal Municipality v. M. Hasan AIR 1972 SC 392 where in it was ruled as under:

Alteration in a rule governing age of retirement of an employee of the Corporation without following the procedure prescribed u/s 24 of the M.P. General Clauses Act is not a valid alteration. The provisions of Section 24 are mandatory. The legislative procedure envisaged by Section 24 is in consonance with notions of justice and fair play as it would enable persons likely to be affected to be informed so that they may take such steps as may be open to them to have the wisdom of a proposal duly debated and considered before it becomes law.

In this case, there was no pre-publication of the two notification relied on by Mr. M.R. Singhvi, issued in exercise of the powers under Sub-section (2) of Section 28A of the Act, by which the State Government has appointed the Authority under the Act. It follows from the foregoing discussion that the Authority which entertained, heard and decided the complaint u/s 28A(2) of the Act was not the prescribed authority in the eye of law under the Act, the proceedings taken on the complaint u/s 28A of the Act filed by non-petitioner No. 2 were void ab initio and the order passed on the complaint was without jurisdiction.

11. The question whether there was waiver and abandonment of the point of jurisdiction or that the petitioner had acquiesced in the jurisdiction are not of any significance in this case, for, there was no properly constituted authority under the Act. The Authority which passed the order is no Prescribed Authority under

the Act. We have carefully considered the authorities relied on by the learned Counsel for non-petitioner No. 1 and we have no hesitation in saying that they cannot be availed by him.

12. It needs to be mentioned here that the petitioner filed the writ petition under Articles 226 and 227 of the Constitution for the issuance of a writ of certiorari for quashing the order dated August 27, 1977. The foundation was laid in writ petition that the order was wholly without jurisdiction as the Authority which passed the order was not the Prescribed Authority. Before the learned single Judge, this point was raised. He adjudicated on that point and repelled the contention of the learned Counsel for the petitioner that the Authority which passed the order was not the Prescribed Authority under the Act. Before the learned single Judge, the point that the petitioner's argument that the order of the Authority is without jurisdiction should not be entertained and considered as he did not raise this point of jurisdiction before it, was not raised and the learned single Judge has examined it on merits the contention regarding jurisdiction. We are concerned with legality, propriety and correctness of that part of the order of the learned single Judge by which he came to the conclusion that the Authority which passed the order was the Prescribed Authority.

13. For the reasons mentioned here in above, we regret that we have not been able to agree with the conclusion arrived at by the learned single Judge, as in our opinion, the Authority which passed the order Annexure-1 was not the Prescribed Authority under the Act and the notification relied upon by the learned Counsel for non-petitioner No. 1 cannot be of any avail.

14. In view of the conclusion to which we have arrived at, we do not consider it proper to examine the other arguments raised by learned Counsel for the petitioner and the learned Counsel for non-petitioner No. 1.

15. The upshot of the above discussion is that the order Annexure-1 dated August 27, 1977 passed by non-petitioner No. 2 is wholly without jurisdiction as he was not the Prescribed Authority under the Act so as to entertain hear and decide the complaint u/s 28A of the Act filed by non-petitioner No. 1. The judgment under appeal, therefore, cannot be sustained.

16. We, therefore, allow the appeal set aside the order dated July 19, 1984 of the learned single Judge and allow the writ petition filed by the petitioner-appellant and quash the order Annexure-1 dated August 27, 1977 passed by non-petitioner No. 2.

17. In the circumstances of the case, the parties are left to bear their own costs of this appeal.