

Mool Chandra Sharma Vs. General Manager, Kisan Sahkari Chini Mills Ltd. and ors.

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Court : Allahabad

Decided On : Nov-30-1998

Reported in : [1999(81)FLR288]; (1999)IIILLJ1362All; (1999)1UPLBEC742

Judge : D.K. Seth, J.

Acts : Uttar Pradesh Shops and Commercial Establishments Act, 1962 - Sections 2(16); Uttar Pradesh Shops and Commercial Establishments Rules, 1963 - Rule 15; [Constitution of India](#) - Article 12; Industrial Disputes Act

Appeal No. : C.M.W.P. No. 43410/1992

Appellant : Mool Chandra Sharma

Respondent : General Manager, Kisan Sahkari Chini Mills Ltd. and ors.

Advocate for Def. : A.K. Misra, Adv.

Advocate for Pet/Ap. : Ashok Bhushan, Adv.

Disposition : Petition dismissed

Judgement :

D.K. Seth,J.

1. By an order dated November 11, 1992 the petitioner's service was dispensed with after holding an enquiry against him on the alleged misconduct levelled through a charge-sheet. The petitioner had preferred an appeal as provided in the relevant standing orders which also stood dismissed. The appeal was preferred pursuant to leave granted by this Court and after the appeal was dismissed, by way of amendment, then said order dated June 27, 1996 has also been challenged in this writ petition.

2. Mr. A.K. Misra, learned counsel for the respondents, had raised a preliminary objection about maintainability of the writ petition against a cooperative society when the petitioner was not governed by any statutory rules framed under the U.P. Cooperative Societies Act governing service conditions of the petitioner.

3. Mr. Ashok Bhushan, learned counsel for the petitioner in support of his opposition to the preliminary objection had contended that even though the petitioner was not governed by statutory rules governing his service conditions, yet the cooperative society being saddled with statutory obligations as provided in Section 19 of the U.P. Shops and Commercial Establishments Act, 1962 read with rule 15 of the U.P. Shops and Commercial Establishments Rules, 1963, a writ petition is maintainable against co-operative society. In order to support his contention, Mr. Ashok Bhushan had pointed out that the petitioner is a field worker and is not connected with manufacturing process and his duties were outside the factory premises, and therefore he was not covered by the Standing Orders of the society governing service conditions of its employees. He had next contended that since the order passed by the appellate authority has been challenged in this writ petition, therefore, the appellate authority being a statutory authority and a State within the meaning of Article 12 of the Constitution, writ petition would be maintainable. He next contends that on the very face of the order of suspension, it appears that the charges which were levelled against the petitioner, were related to the Engineering department, with which the petitioner was not concerned and that the other charges were absolutely vague and on the face of it, the basis of termination being perverse, this Court should interfere in the present case. He had also relied on a few decisions in support of his contentions, which will be dealt with at appropriate stage. He had also relied on various sections of the U.P. Shops and

Commercial Establishments Act and the Rules framed thereunder as well as U.P. Industrial Disputes Act and Factories Act respectively. He had also relied on supplementary affidavit seeking to incorporate necessary pleading to support his contention.

4. Mr. A.K. Misra, learned counsel for the respondents on the other hand, contended that in paragraphs 39 and 46 of the writ petition, the petitioner himself had admitted that the service conditions were governed by certified standing orders applicable to the workers of sugar factories in the State. The said two paragraphs of the writ petition have not been amended. By means of filing a supplementary affidavit, the pleadings cannot be altered. He further contends that a co-operative society is not a State within the meaning of Article 12 has been held by this Court and the petitioner having not been governed by the statutory rules, the writ petition cannot be maintained. He also contends that the standing order has no statutory force as has been held by the Apex Court, and therefore it does not cast statutory obligations on the society, owing to which it could be amenable to the writ jurisdiction. He further contended that there being adequate alternative remedy available through raising an industrial dispute, the writ petition is not maintainable. He had also relied on a few decisions that will be dealt at appropriate stage.

5. I have heard both Mr. Ashok Bhushan and Mr. A.K. Misra at length.

6. In paragraph 39 and 46 of the writ petition, it has been contended by the petitioner that enquiry against the petitioner was required to be held in accordance with the standing order governing the employees working in vacuum pan Sugar Factories in Uttar Pradesh and that enquiry against the petitioner was not held in accordance with the requirements of the standing orders governing employees of Sugar factories. By means of a supplementary affidavit, filed on September 9, 1998, the petitioner had sought to bring on record the fact that the petitioner was a cane inspector and in fact used to perform duties of field worker, who goes to the farmers and pursues the farmers to sell their cane to the mill and that a cane Inspector ensures transportation of sugar cane from the purchase centre to the mill, and he was working in a supervisory capacity and not a workman within the

meaning of U.P, Industrial Disputes Act, and since he used to work outside the premises of the mill, he was governed by statutory provisions of U.P. Shops and Commercial Establishments Act, 1962 and U.P. Shops and Commercial Establishments Rules, 1963, and that the petitioner has been dismissed from service in violation of the principles of natural justice without affording any opportunity.

7. It appears that an inconsistent pleading has been sought to be made out through the supplementary affidavit without amending the writ petition. Mr. Ashok Bhushan submitted that alternate pleading is permitted. Therefore, supplementary affidavit may be treated as alternative pleadings. But such a submission appears to be wholly misconceived. Inasmuch as the entire basis of the writ petition was that the provisions of the standing order applicable were violated. Now, it cannot be said that he is not governed by the standing order and is governed by the U.P. Shops and Commercial Establishments Act while treating both as alternate pleadings. Alternate pleading means if one pleading cannot be sustained then the petitioner may be permitted to rely on the alternate pleading. In the present case, the petitioner is seeking to give up the first pleading altogether in order to substantiate the contention that the writ petition is maintainable. The very submission of Mr. Ashok Bhushan indicates that he was not treating the pleading sought to be incorporated through the supplementary affidavit as alternate pleading, but as the sole pleading on which he had based his submissions. Then again, alternate pleading cannot be such as to contradict each other to such extent as to move almost to opposite direction. The petitioner having admitted to be governed by the standing order in the pleadings in the writ petition itself and the said admission having not been deleted or withdrawn, through an altogether inconsistent pleading, the same cannot be treated to be an alternate pleading.

8. The object of the pleadings is to ascertain the real dispute between the parties, to narrow the area of conflict and to see where the two sides differ, is the ratio laid down in the case of J.K. Iron and Steel Company v. Iron and Steel Mazdoor Union (1956-I-LLJ-227) (SC). The principle behind the rule is that no party can be prejudiced by change of front by other side, is the observation made in the case of Inder Mal Tekaji v. Ram Prasad AIR 1970 MP 40. Alternative plea in certain cases

are permissible to the extent that such pleas are not so distinct and inconsistent that they cannot co-exist.

9. In the case of Nanak Ram v. Kundalrai, AIR 1986 SC 1194 alternative plea seeking to oust the jurisdiction of the forum was held impermissible. On the same analogy when on the basis of the pleading already made, the petition is outside the scope and ambit of the jurisdiction of the forum chosen; the same cannot be avoided by inserting alternative pleading to bring the case within the jurisdiction of the forum to suit his own purpose.

10. In the present case the pleadings are so inconsistent and are opposite in direction that they can never co-exist and when the pleading already made ousts the jurisdiction the alternative pleading sought to be brought in seeks to create jurisdiction.

11. In the case of Tulsi Das Khemji v. Their Workman, (1962-I-LLJ-435) (SC) the apex Court had held that the Court has to be very strict in enforcing the rule of pleading as laid down in the Rules of the Court bearing on the question of submission of case of the parties. These rules have been laid down with a view to help the Court in narrowing down the controversies between the parties and also for the purpose of giving notice to the other side that a particular question will be raised and that the party should be ready to meet that particular point. The Court would not ordinarily permit any laxity in the matter of pleadings in the Court.

12. In the case of H.H. Sri Swamiji of Sri Admar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Department, AIR 1980 SC 1 it was held that under Articles 32 or 226 of the [Constitution of India](#), a pleading or submission of the material facts is necessary on the side of the petitioner, and if his claim is contested, on the side of the respondent, for that enables them to formulate their case in preparation of the hearing. Besides giving fair notice of the case of either side, that defines the points at issue and confines the controversy to them. It also enables the parties to bring out their evidence to its advantage and eliminates prejudice or a snap decision.

13. In the case of *Kishori Lal v. Chalti Bai*, AIR 1959 SC 504 it was held that a case different to that in pleading cannot be set up.
14. In the case of *Bharat Coking Coal Limited v. State of Bihar*, 1990 (4) SCC 557 it was held that deviation from the stand taken throughout before the Court, cannot be allowed.
15. In the present case, the supplementary affidavit was filed as indicated hereinbefore after the point of maintainability was urged by Mr. A.K. Mishra and the matter was adjourned successively from September 7, 1998 till September 9, 1998 without, however, amending the pleading made in paragraphs 39 and 45 respectively.
16. Then again, this pleading has also to be decided on the basis of applicability of the U.P. Shops and Commercial Establishments Act, 1962 in respect of the petitioner's service having regard to the provisions of the said 1962 Act as well as in regard to the Factories Act, 1948 and U.P. Industrial Disputes Act, 1947. 'Commercial Establishment' has been defined in Section 2 (4) of the 1962 Act, to mean, 'any premises, not being the premises of a factory, or a shop, wherein any trade, business, manufacture, or any work in connection with, or incidental or ancillary thereto is carried on for profit and includes a premises wherein journalistic or printing work, or business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, or which is used as theatre, cinema, or for any other public amusement or entertainment, or where the clerical and other establishment of a factory, to whom the provisions of the Factories Act, 1948 do not apply, work.' 'Shop' has been defined in Section 2 (16) of the said 1962 Act, to mean 'any premises, where any wholesale or retail trade or business is carried on or where services are rendered to customers, and includes all offices, godowns or warehouses, whether in the same premises or not, which are used in connection with such trade or business.'
17. Even on the basis of the alleged alternate pleadings, the purchase centre of the sugar mill, cannot be a shop within the meaning of Sub-section (16) of Section 2 of the 1962 Act since in the said premises, namely, the purchase centre, no wholesale or retail trade or business is carried on or services are rendered to the

customers. Inasmuch as in such purchase centres the canes are purchased for being used in the factory itself, to which it is a raw material for the purpose of manufacture of sugar. Therefore, the mills do not deal with sugar cane purchased in the purchase centre by way of trade or business either wholesale or retail. On the other hand, it purchases sugar cane as its raw material to be used for its own consumption in the mill itself. Therefore, the purchase centre cannot be said to be a shop within the meaning of Section 2(16) of the 1962 Act.

18. In order to be a commercial establishment, it should satisfy the test laid down in Section 2 (4) of the Act, which excludes a shop wherein any trade, business, manufacture or any work in connection with or incidental or ancillary thereto, is carried on. As observed earlier, the sugar cane being purchased as raw material for consumption in the mill for the purpose of manufacture of sugar, it is incidental or ancillary to the manufacture of sugar by the mill itself and purchase of the sugar cane being a work in connection with or incidental or ancillary to the manufacture of sugar, even if carried on outside the premises of the factory, the purchase centre does not become a commercial establishment within the meaning of Section 2 (4) of the 1962 Act. There is no pleading to the extent that this premises is being used for the purpose of clerical and other establishment work of the factory, to which the provisions of the Factories Act, 1948 do not apply.

19. Therefore, it is very difficult even on the alternate pleadings to bring the facts within the ambit and scope of U.P. Shops and Commercial Establishments Act, 1962 even on the basis of alternate pleadings as pleaded.

20. The effect of the standing order was considered in the case of *The Rajasthan State Road Transport Corporation and Anr. v. Krishna Kant and Ors.*, (1994-I-LLJ-136) (SC) wherein it was held that standing orders do not have statutory force. Since the petitioner had claimed in the writ petition as is evident from paragraph 39 and 46 that he is governed by the standing orders, which do not have statutory force therefore, there was no obligation on the sugar mill, which is admittedly a co-operative society, which could be termed as statutory obligation or liability cast on it through any statute.

21. Then again, even if the U.P. Shops and Commercial Establishments Act, 1962 enjoins certain protection extended to the workers employed in shops and commercial establishment and if such protection is violated by a person not an authority within the meaning of Article 12, simply by reason of violation of statutory obligations, the actions on the part of such private employer, the writ jurisdiction cannot be invoked. If such stand is taken in that event, all private entrepreneurs are bound by one or other provisions of statute which cast upon it certain duties and liabilities, shall be amenable to the writ jurisdiction which will render the whole remedy provided under Article 226 an ineffective and uncontrollable remedy which cannot be catered to by the Courts, for which caution was sounded by this Court in a Full Bench decision as back as in 1951 when horizon of the writ jurisdiction was not extended to the extent now it has been. In the case of *Indian Sugar Mills Association v. Secretary to Government, U.P. Labour Department, and others*, AIR 1951 All. 1 (FB) it was observed that 'this Court is being flooded with applications under Article 226 of the Constitution which is seriously affecting the normal work of the Court. We feel that the time has come when we may point out that Article 226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual Courts established by law. The power under this Article should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate and specific remedy available to him.' This observation is much more relevant in the present day context having regard to the situation now the High Courts are facing with voluminous work, with which it is very difficult to cope resulting into delay in the process and thus reading characteristics of the proceedings as a speedy remedy putting barriers on the speed which was one of the concept for providing the remedy.

22. However, the question would be different if such private person satisfies the test of instrumentality and agency of the State as laid down in the case of *Ramana Dayaram Shetty v. International Airports Authority of India & others* (1979-II-LLJ-217) (SC). Applying the said test a private person running a shop or a commercial establishment does not become a statutory authority simply because 1962 Act provides certain protection to the employees governing the contractual relationship of service between the employee and the employer and such contract being

absolutely a private contract without the backing of any statutory force. A condition of service governed by the contract, private in nature, that might be circumscribed by certain provisions provided in the statutes extending protection cannot be termed to be a statutory contract. The contract is wholly independent of the statute being the 1962 Act. The 1962 Act lays down certain guidelines within which the contracts are to be entered into. But it does not lay down anything to render a contract of service between the private employer with its employee a statutory one. While discharging the liability under such private contracts even if restricted by certain conditions creating protection for the employees, does not confer a statutory obligation on the employer to an extent to convert such private employer into an instrumentality or agency within the meaning of the ratio laid down in the case of International Airport Authority of India (supra),

23. In the case of Radha Charan Sharma v. U.P. Co-operative Federation and Ors., 1982 ALR (8) 342 (FB) this Court had held that a cooperative federation is not an authority within the meaning of Article 12. While dealing with the similar question in the decision in Jai Karan Singh v. General Manager, U.P. Co-operative Sugar Mill Federation Ltd. (Writ petition No. 6584 of 1996, disposed of on May 23, 1997), relying on a notification dated March 31, 1987, whereby the co-operative sugar factories and their apex society, the U.P. Co-operative Sugar Factories Federation Limited were excluded by way of amendment made in pursuance of the provisions of Sub-section (1) of Section 122 of the U.P. Co-operative Societies Act, 1965 read with Rule 389-A of the U.P. Co-operative Societies Rules, 1968 and Section 21 of U.P. General Clauses Act, 1904, this Court held that service of the employees of the sugar factories are being governed by the standing orders and thus excluded the application of the rules governing service conditions of the employees of co-operative societies framed under Co-operative Societies Act. In another decision in the case of Nandji Thakur v. Managing Director, U.P. Co-operative Sugar Factories Federation Ltd. and Ors. (Writ Petition No. 27800 of 1996, disposed of on November 26, 1996), this Court held that the standing orders having no statutory force, violation thereof is not a violation of public duty or statutory responsibility, and therefore it does not make the employer amenable to the writ jurisdiction.

24. 'Industry' has been defined in Section 2 (k) of the U.P. Industrial Disputes Act, to mean 'any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen','Workmen' is defined in Section 2 (z) to mean 'any person employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical 'work for hire or reward, whether the terms of employment be express or implied, and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person'. Thus, even if the petitioner is not directly connected with the manufacture of sugar, but still he is a workman within the said definition if he performs supervisory work or clerical work connected with the industry as observed earlier as purchase of the sugar cane was directly connected with the industry of the employer. The facts of the case as pleaded in the writ petition in paragraphs 39 and 46 admitting to be governed by the standing orders coupled with the fact as indicated above, the petitioner is surely a workman within the meaning of the Industrial Disputes Act governed by the standing orders.

25. Mr. Ashok Bhushan, learned counsel for the petitioner had relied on the decision in the case of Sri Konaseema Co-operative Central Bank Ltd. and Anr. v. N. Seetharama Raju, AIR 1990 AP 171 (FB) particularly paragraph 51 thereof, where entire ratio has been summarised. I have gone through the said judgment. With due respect to the said decision, I am unable to persuade myself to agree with the ratio decided therein to the extent as observed therein which held that violation of Section 47 of the Andhra Pradesh Shops and Establishments Act even by private entrepreneurs can be interfered with under Article 226 if violation of a statutory public duty is established irrespective of the fact that the Act or the Rules do not cast any statutory public duty. The reason of my disagreement has already been discussed hereinbefore. Mr. Ashok Bhushan had also relied on the decision in the case of Aley Ahmad Abidi v. District Inspector of Schools, AM., AIR 1977 Alld. 539 to support his contention that even if the employer is not a State within the meaning of Article 12, if it is entrusted with the performance of statutory duties or is conferred with statutory powers, then such private bodies are also amenable to writ jurisdiction. This proposition is not disputed by Mr. A.K. Misra since being an established principle. But in the facts and circumstances of the case which is

wholly distinguishable, the ratio decided therein cannot be attracted. Inasmuch as it is already observed that no statutory duty or obligation has been cast upon the employer by reason of non-observance of the provisions contained in the standing order or otherwise as contended by Mr, Ashok Bhushan. He had also relied on the decision in the case of State of U.P. v. M.P. Singh 1960 ALJ 232. In this decision, Mr. Ashok Bhushan had pointed out that, the Apex Court had held that the field worker employed by the sugar factory for growth and supply of sugarcane for use in the factory, are not workers under the Factories Act including definition of commercial establishment as defined in Section 2 (3) of the U.P. Shops and Commercial Establishments Act, 1947. The definition with which the said decision has dealt with appears to be different from the definition of commercial establishment as is incorporated in the 1962 Act and therefore, the said decision cannot help Mr. Ashok Bhushan having regard to the text of the definition as included in 1962 Act which materially differs from the definition which was dealt with in the said decision. Mr. Ashok Bhushan had also relied on the decision in the case of Basudeo Tiwari v. Sido Kanhu University, JT 1998 (6) SC 464 to contend that if there is termination of service without any opportunity given, it is hit by the principle Audi Alteram Partem' and as such is amenable to writ jurisdiction. In view of the observations made earlier, this decision also does not help Mr. Ashok Bhushan.

26. In the facts and circumstances of the case, therefore, the petitioner having been found to be governed by the standing orders and the standing orders having no statutory force and the cooperative societies having been held to be not an authority within the meaning of Article 12, or being amenable to the writ jurisdiction, this writ petition is not maintainable, and accordingly it is dismissed as not maintainable.

27. However, this order will not prevent the petitioner from approaching the forum under the Industrial Disputes Act and if such disputes are raised, it is expected that the State Government would expedite the reference at the earliest. It is expected that the authority concerned would have regard to the time that has lapsed after the order of termination while dealing with the petitioner's case.

28. All observations with regard to the merits of the case made in this order are tentative in nature for the purpose of deciding the preliminary issue and shall not affect merits of the petitioner's case if an industrial dispute is raised before the appropriate forum, which will be free to decide all questions in accordance with law.

29. The writ petition stands dismissed as not maintainable. There will, however, be no order as to costs. Let a copy of this order be issued to the learned counsel for respective parties on payment of usual charges at the earliest.

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