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Court : Rajasthan

Decided On : Jan-25-1991

Reported in : (1993)IIILLJ834Raj; 1991(1)WLN24; 1991(2)WLN274

Judge : A.K. Mathur, J.

Acts : [Rajasthan Shops and Commercial Establishments Act, 1958](#) - Sections 2(3), 2(5) and 28A; [Constitution of India](#) - Article 254; [Industrial Disputes Act, 1947](#) ; [Factories Act, 1948](#)

Appeal No. : S.B.C.W.P. No. 3611 of 1988

Appellant : Ranjit Singh

Respondent : General Manager, Lake Palace Hotel and ors.

Advocate for Def. : C.N. Sharma,; K.N. Joshi and; Manoj Sharma, Adv.

Advocate for Pet/Ap. : M. Mridul, Adv.

Disposition : Petition allowed

Judgement :

A.K. Mathur, J.

1. The petitioner, by this writ petition has prayed that the order dated 30.3.1988 passed by the Prescribed Authority be set aside and the said Authority may be

directed to proceed and decide the complaint of the petitioners on merits.

2. The petitioner entered the service of the respondent No. 2 a Commercial establishment within the meaning of the [Rajasthan Shops and Commercial Establishments Act, 1958](#) (hereinafter referred to as 'the Act') on a monthly salary of Rs. 926.85 on 30.8.1971. While discharging the duties of Steward-Cum-Dining Supervisor in the service of respondent No. 2, Lake Palace Hotel and Motel Pvt. Ltd., the petitioner was dismissed from service vide order dated 13.8.1983 by the respondent No. 2. Prior to dismissing the petitioner from service, a notice dated 7.8.83 was issued to the petitioner levelling certain charges and he was called upon to reply within two days. Thereafter the petitioner was dismissed from service on 13.8.1983. The petitioner approached the Authority under the Act by filing a complaint under Section 28A of the Act. This complaint was rejected by the authority under the Act by its order dated 30.3.1988 on the ground that it has no jurisdiction to decide the matter. Hence, the petitioner has filed the present writ petition.

3. Mr. Mridul, learned counsel for the petitioner, submitted that the order passed by the Authority is absolutely wrong because as per the definition as given in Sub-section (3) of Section 2 of the Act the respondent No. 2, Lake Palace Hotel and Motel Pvt. Ltd. is a commercial establishing and in terms of Sub-section (5) of Section 2 of the Act, the petitioner is an employee. Therefore, under Section 28-A of the Act the Authority under the Act has jurisdiction to hear and decide the matter.

4. Mr. Sharma, learned counsel for the respondents submitted that the order passed by the Authority under the Act is correct and he emphasised that the petitioner does not fall within the ambit of the definition of employee as given in Section 2(5) of the Act. Hence, the order passed by the Authority under the Act is valid. Learned counsel also submitted that under Article 254 of the [Constitution of India](#) the Parliament has already enacted the [Industrial Disputes Act, 1947](#), therefore, the Act of 1958 on the same area cannot survive and when there is any Act which conflicts with the Act made by the assent of the President, the Act of Parliament shall prevail.

5. In order to appreciate the controversy raised in this writ petition, it will be necessary to refer to the necessary provision of law on the subject. Section 2(3) which defines 'commercial establishment' reads as under:

2(3) 'Commercial establishment' means a commercial or trading or banking or insurance establishment, an establishment or administrative service in which the persons employed are mainly engaged in office work, a hotel, restaurant, boarding or eating house, cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes every such establishment as the State Government may, by notification in the Official Gazette, declare to be a commercial establishment for the purposes of this Act;

6. The definition of 'employee' as given in Section 2(5) reads as under:

2(5) 'employee' means a person wholly or principally employed in, or in connection with any establishment and includes an apprentice but does not include a member of the employer's family; it also includes any clerical or other staff of a factory or industrial establishment who falls outside the purview of the [Factories Act, 1948](#) (Central Act LXIII of 1948);

7. The term 'establishment' as defined in Section 2(7) reads as under: -

2(7) 'establishment' means a shop or a commercial establishment"

8. Section 28-A which provides the remedy against dismissal, discharge and termination of the services by the employer reads as under: -

'28-A. Notice of dismissal or discharge by employer. (1) No employer shall dismiss or discharge from his employment any employee who has been in such employment continuously for a period of not less than 6 months except for a reasonable cause and after giving such employee at least one month's prior notice or on paying him one month's wages in lieu of such notice:

Provided that such notice shall not be necessary where the services of such employee are dispensed with for such misconduct, as may be defined in the rules made by the State Government in this behalf, and supported by satisfactory

evidence recorded at an enquiry held for the purpose in the prescribed manner.

(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 his service; or

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

(c) that he had not been guilty of any misconduct:

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.

(3) The prescribed authority shall cause a notice to be served on the employer relating to the said complaint, record briefly the evidence produced by the parties, hear them and make such enquiry as it may consider necessary and thereafter pass orders in writing giving reasons therefor.

(4) While passing an order under Sub-section (3), the prescribed authority shall have power to give relief to the employee by way of reinstatement or by awarding money compensation or by both.

(5) The decision of the prescribed authority under this section shall be final and binding both on the employer and the employee.'

9. The argument of Mr. Mridul is simple that in terms of sub Section(3) of Section 2 theHotel is a commercial establishment and petitioner is an employee. Therefore, the authority under the Act has jurisdiction to hear and decide the petitioner's complaint.

10. There is no dispute that under Sub-section (3) of Section 2 of the Act, the respondent No.2 is a commercial establishment. It says that commercial establishment means a commercial or trading or banking or insurance

establishment where the employees are employed for administrative service and mainly engaged in the office work. Then, it further lays down that a hotel, restaurant, boarding or eating house, cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes every such establishment as the State Government may, by notification in the official Gazette, declare to be a commercial establishment for the purpose of this Act. So far as the non-petitioner No.2 is concerned, there are no two opinions that it is a commercial establishment and Mr. Sharma, learned counsel for the respondents has also not seriously disputed this part of the argument.

11. The next question, which has been debated, is whether the petitioner falls within the definition of Sub-section (5) of Section 2 or not. Sub-section (5) of Section 2 lays down that any person wholly or principally employed in or in connection with any establishment and it further includes an apprentice. But it does not include a member of the employer's family. This is one part of the definition. The other part of the definition is that it shall also include any clerical or other staff of a factory or industrial establishment who falls outside the purview of the [Factories Act, 1948](#). Therefore, the analysis of this definition is that this definition can be conveniently divided into two parts, first part includes, which is of very general nature and says that any incumbent who is wholly or principally employed in any establishment including apprentice shall be treated as an employee except the members of the employer's family. Therefore this part of the definition is very widely worded and it includes all employees who are employed in connection with the establishment. The second part says that it shall also include any clerical and other staff of the factory or an industrial establishment who falls outside the purview of the [Factories Act, 1948](#). Therefore, this second part of the definition, as matter of facts, deals with the employees, who are employed in any factory or any industrial establishment and that factory does not fall within the provisions of the Factories Act. The second part of the definition only relates to the clerical and other staff of a factory or industrial establishment which does not fall within the purview of the [Factories Act, 1948](#). Thus, this part of the definition has no relevance so far as the present establishment is concerned. Both the learned counsel were labouring under the misprinted provisions, of Section 2(5) of the Act. But the correct provision, which has been quoted above from the Rajasthan

Gazette, Extraordinary, dated 4.8.1958, makes it clear that the second part of the definition has no relevance so far as the case in hand is concerned.

12. The reference of the cases on the subject i.e. The Krishna Distt. Co-operative Marketing Society Ltd. Vijaywada v. N.V. Purnachandra Rao and Ors. 1987 II CLR 213, :AIR 1987 SC 169, SC, The South Gujarat Tiles Manufacturers Association and Anr. v. The State of Gujarat and Anr., 1976 LIC. 1978, The Manager, Hotel Imperial, New Delhi v. The Chief Commissioner, Delhi and Ors. AIR 1959 SC 1214:1959(2) LLJ 553, Thakur Amar Singhji and Ors. v. State of Rajasthan and Ors. AIR 1955 SC 504, And The State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors.: 1960(I) LLJ 251 will have no bearing on the interpretation of the definition of employee given in Section 2(5) of the Act.

13. Mr. Sharma, learned counsel for the respondents invoked the principle of ejusdem generis for the purpose of interpretation. This provision has no relevance. As per the correct provision, which has been reproduced above it appears that the definition is in two parts and the second part of the definition has no relevance whatsoever with the case in hand. The first part of the definition is very widely worded and it encompasses all employees who are employed wholly or principally in or in connection with any establishment shall be governed by it and it rather includes even an apprentice. Therefore, a bare reading of Sub-section (5) of Section 2 read with Sub-section (3) and Sub-section (7) of Section 2 makes it very clear that the petitioner is an employee within the meaning of Sub-section (5) of Section 2 of the Act.

14. The next question is whether under Section 28-A of the Act such application is maintainable or not. Section 28-A was inserted by amendment in this Act in the year 1972 which was published in the Rajasthan Gazette, Extraordinary, dated 17.3.1972 at page 103 as quoted above. Sub-section (2) of Section 28-A says that every employee so dismissed or discharged may make 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 grounds mentioned under Sub-section (2) of Section 28-A Clauses (a) to (c). Thus, the word used in Sub-section (2) of Section 28-A is employee and the employee has been defined as

mentioned in Sub-section(5) of Section 2 of the Act. Therefore, it is clear that any employee of any commercial establishment can make a complaint before the prescribed authority under Section 28-A of the Act. Thus, a bare reading of this provision makes it very clear that the petitioner, who was an employee of the Lake Palace Hotel & Motel Pvt. Ltd., can file a complaint against his order of dismissal before the Authority under the Act and the authority under the Act has jurisdiction to decide the matter in accordance with law.

15. Mr. Sharma, learned counsel, has referred to Article 254 of the [Constitution of India](#) and submitted that by virtue of the theory of occupied legislation, since the Parliament has enacted the law on the subject, therefore, this law on the same subject cannot survive. The argument of the learned counsel is not tenable. In the present case, there is no conflict between the present Act and the [Industrial Disputes Act, 1947](#) framed by the Parliament. This Act is enabling Act and there is no conflict between the two Acts so as to invoke the provisions of Article 254 of the [Constitution of India](#). The area of operation of this Act is well defined and it permits the invoking of the provisions of this Act except the employees of factories and industrial establishments, who are governed by the [Factories Act, 1948](#). Here, the definition of the employee includes anybody for that matter, may be a small workman or may be any big executive of the establishment.

16. Mr. Sharma, learned counsel for the respondents submitted that the appointment to the office of Judge, Industrial Tribunal or the Labour Court is normally of a High Court Judge or a Senior District judge and the prescribed authority under the present Act may not be of that cadre. Therefore, the learned counsel submitted that this Act really never intended to cater such employees like the petitioner. This cannot be a ground for construing the provisions of the Act. However high or low may be the incumbent but the question has to be decided on the basis of plain reading of the provisions of the Act. While interpreting the provisions of law, it is hardly of any relevance. Thus, this argument of the learned counsel also cannot be of any avail.

17. In the result, I allow the writ petition and set aside the order of the Prescribed Authority dated 30.3.1988 and direct the Authority shall proceed with the matter

and decide the complaint in accordance with law.

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