
(1959) 08 CAL CK 0019
In the Calcutta High Court
Case No : A.F.A.D. No. 735 of 1954

Bhaskar Mukherjee and Another	Vs	APPELLANT
Nilmoni Nath		RESPONDENT

Date of Decision : 06-08-1959

Acts Referred:

Citation : AIR 1962 Cal 285

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

Advocate : Siddhartha Roy and Sukumar Sen, for the Appellant; Jnanendra Nath Bakshi and Anilendra Nath Roy Choudhury, for the Respondent

Final Decision : Allowed

Judgement

Renupada Mukherjee, J.—This is an unfortunate litigation between a driver of motor cars and trucks and his employers having its foundation on a certificate of character given by one of the employers to which I shall refer later. The driver is the respondent in this appeal, and he was the plaintiff in the Trial Court. The employers Bhaskar Mukherjee and his son Prabir Mukherjee, who are appellants in this appeal were defendants in the Trial Court.

2. The suit of the plaintiff was a simple one. He prayed for recovering a sum of Rs. 1050/- from the defendants on the allegation that he had been employed by them on a salary of Rs. 125/- per month, and salary for seven months from January, 1950, to July, 1950, remained due. The plaintiff's case was that he was entitled to recover this amount and also the salary for the month of August, 1950, as no notice of discharge was given to the plaintiff. A sum of Rs. 50/- was also claimed as compensation for loss of dress and beddings in the course of business.

3. The suit was contested by the two defendants who filed separate written statements. The main defence of defendant no. 1 Bhaskar Mukherjee was that he was not the employer, but the other defendant, his son, was the employer. The

defence of defendant No. 2 was that the plaintiff was in his service up to 28th February, 1950. The plaintiff was directed to proceed to Orissa in connection with a business of defendant no. 2, but he refused to go to Orissa and absented himself from duty from 1st March, 1950, and thereby terminated his service voluntarily. It was further the contention of defendant No. 2 that excepting a sum of Rs. 25/- all other dues of the plaintiff up to February, 1950, had been paid.

4. Parties adduced evidence, both oral and documentary, in support of their respective contentions. The Trial Court held that except for an amount of Rs. 60/- all other dues of the plaintiff up to February, 1950, had been paid. The Trial Court further held that the plaintiff was in the service of the defendants up to February, 1950, and not for any period after that. Accordingly, the Trial Court passed a decree for Rs. 60/-. The plaintiff preferred an appeal which succeeded. The Lower Appellate Court set aside the judgment and decree of the Trial Court and passed a decree for Rs. 935/- against the defendants with proportionate costs. This Second Appeal has been preferred by the defendants from the judgment and decree passed by the Lower Appellate Court.

5. This appeal was argued on behalf of the appellants by the learned Counsel Mr. Siddhartha Roy, and by Mr. Bakshi on behalf of the respondent. From the facts set out earlier in the judgment one may get the impression that the appeal is concluded by a finding of fact arrived at by the Lower Appellate Court on the question of the length of service of the plaintiff respondent. No doubt, the principal bone of contention between the parties is the length of service of the respondent. But the finding arrived at by the Lower Appellate Court seems to have been vitiated by the application of a wrong principle of law regarding the termination of the service of a servant.

6. The definite finding of the Trial Court was that the plaintiff Nilmoni Nath was in the service of the defendants up to February, 1950, and not for any period beyond that. The Lower Appellate Court has not practically set aside that finding. It has relied on a certificate of character given by appellant No. 1, Bhaskar Mukherjee, to respondent Nilmoni Nath on 3rd August, 1950. In this certificate it has been stated that the plaintiff respondent was in the employment of the defendants for a period of eleven months. Though the certificate has been described as a discharge certificate by the Trial Court, in reality it was a character certificate. It has been stated therein that Nilmoni Nath was in the employment of Bhaskar Mukherjee as a mechanic and driver of Diesel trucks for a period of eleven months, and he left his service as it was inconvenient for him to be stationed outside Calcutta. Relying on this certificate, the Lower Appellate Court held that the plaintiff must have served the defendants up to July, 1950, because it was the admitted case of the parties that the service of the plaintiff commenced in September, 1949. A period of eleven months from September, 1949, would take us to July, 1950.

7. The above certificate, as I have already said is the foundation for the present suit. The case of the defendants was that it was given in a hurried and informal

manner, and the period mentioned therein was a gross mistake. The Lower Appellate Court seems to have thought that having granted this certificate, it was not open to the appellants to say that the plaintiff was in the employment of the appellants for a shorter period. In my opinion, this is not the correct position. The certificate at best contains an admission of Bhaskar Mukherjee regarding the length of service of the plaintiff. In this connection I may refer to a letter written by the plaintiff himself to the Labour Commissioner for interfering in this matter (Ex. B). A perusal of this letter leaves no room for doubt that the plaintiff actually served the defendants up to February, 1950. It is an admitted fact that up to February, 1950, Nilmoni Nath worked as a driver in defendants' transport service in North Badjna Colliery. The letter contains a distinct admission that the plaintiff was not given any other work after 27th February, 1950, although he had been visiting the house of the defendants now and then. A schedule is given in the letter about the dues of the plaintiff. He claims six months' wages from January, 1950, to June, 1950, besides some other dues in respect of other items with which I am not concerned in the present appeal. This letter fits in with the case of the appellants that the respondent ceased to perform any work for the appellants after February, 1950. The lower Appellate Court has not properly understood the importance of this letter and has not dealt with this letter properly in its judgment.

8. I shall now come to the question whether the judgment of the Lower Appellate Court is in correct on account of the application of any wrong principle of law. At one place in its judgment, that Court has said that abstention from duty does not operate as termination of service. In my opinion, this proposition of law which the Lower Appellate Court has applied to the facts of the present case is incorrect in the facts and circumstances of this particular case. If a servant willfully absents himself from duty for a long period without giving notice to the employer, he cannot certainly get his pay for the period during which he remains absent, specially if this absence is referable to some act of disobedience. According to the case, of the defendants, the plaintiff was asked to go to Orissa for performing his duty, and he refused. According to the case of file plaintiff, he was asked to do his duty in a different route, namely, a route from Budge-Budge to Calcutta, but he did not do this duty. In evidence the plaintiff wanted to improve matters by saying that from March, 1950, he drove private cars of the defendants now and then. This story which was not given out either in the plaint or in the letter to the Labour Commissioner, has not been accepted by any of the Courts below. The fact, therefore, remains that after the expiry of February, 1950, the plaintiff respondent refused to do the duty which was allotted to him, and he did not drive any truck or car of the appellants thereafter. These being the circumstances, abstention from duty must operate as voluntary termination of service of the respondent under the appellants, and I am of opinion that no formal order of discharge on the part of the appellants was necessary, as is thought by the Lower Appellate Court. The whole judgment of the Lower Appellate Court has been vitiated by the application of this wrong principle of law

and so that judgment must be set aside and the judgment of the learned Munsif must be restored.

9. Before I Part with this appeal, I must observe that some comments made by the Lower Appellate Court about the truthfulness of the defence of defendant No. 1 were uncalled for. The comments are to the following effect:

"Although this is not a point for our determination in this appeal, I still refer to it only because it would show that when feelings run high even very highly placed gentleman can indulge in mendacity,"

This observation was made because defendant No. 1, Bhaskar Mukherjee, took an objection in his written statement that he was not the employer of the plaintiff. That defence was negated by the Trial Court. But there was no appeal from that part of the decree or judgment of the Trial Court. So, in my opinion, these observations were uncalled for and unmerited.

10. From what I have said above, it follows that the appeal must succeed. I, therefore, allow this appeal and set aside the judgment and decree passed by the Lower Appellate Court and restore and affirm those passed by the learned Munsif. Having regard to all the circumstances of the case, I direct that parties will bear their own costs in this Court and in the lower Appellate Court.

11. Leave is asked for on behalf of the respondent to file an appeal under Clause 15 of the Letters Patent, but is refused.