

(2013) 08 MP CK 0008

In the Madhya Pradesh High Court

Case No : Writ Petition No. 11860 of 2012

Bhawani Shankar

APPELLANT

Vs

Maharashtra Shishan Prasark Mandal and Others

RESPONDENT

Date of Decision : 20-08-2013

Acts Referred:

Citation : (2014) 140 FLR 114 : (2014) 1 MPHT 76

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Advocate : M.I. Khan, for the Appellant; P.V. Bhagwat and Smt. Vinita Phaye, G.A., for the Respondent

Judgement

N.K. Mody, J.—Being aggrieved by the order dated 10.10.2012 passed by XX Civil Judge Class-II, Indore in Execution Case No. 156-A/2009, whereby petition filed by respondents No. 1 and 2 u/s 47 of CPC, was allowed and the execution proceedings filed by the petitioner was dismissed, present petition has been filed. Short facts of the case are that petitioner filed a suit for declaration and permanent injunction alleging that the petitioner was appointed as Gardener/ Watchman by the respondents No. 1 and 2 vide order dated 23.7.1988. It was alleged that the petitioner was discontinued illegally w.e.f. 16.1.1991. In the suit it was prayed that petitioner be reinstated on the post from which the petitioner was removed and back wages be awarded to the petitioner w.e.f. 27th of July, 1990. The suit was contested by the respondents No. 1 and 2 on various grounds. After framing of issues and recording of evidence, learned Trial Court decreed the suit vide judgment and decree dated 31.1.2007, by passing a decree in favour of petitioner to the effect that domestic inquiry against the petitioner is against the principle of natural justice. It was also held that petitioner is posted as Gardener (Bhratya) and is entitled for all the benefits as per rules. Against the judgment and decree passed by learned Trial Court, an appeal was filed by the respondents No. 1 and 2 which was numbered as Civil Appeal No. 17/2007, in the Court of XX Additional District Judge, Indore, and was dismissed vide

judgment dated 16.1.1991, against which Second Appeal was filed by the respondents No. 1 and 2 which was numbered as SA No. 150/2009 and was dismissed vide order dated 3.12.2010. Thus, the judgment passed by learned Trial Court attained finality. Thereafter execution petition was filed by the petitioner wherein it was prayed that respondents No. 1 and 2 be directed to pay a sum of Rs. 7,00,000/-, w.e.f. 16.1.1991 till the date of filing of execution petition @ Rs. 6,000/- per "month. In the said execution petition, objections were filed by respondents No. 1 and 2 u/s 47 of CPC alleging that since the decree which is in favour of the petitioner is only a declaratory decree therefore, the same is not maintainable and no direction can be given against the respondents No. 1 and 2 for recovery of money.

2. After hearing the parties and the objections filed by the respondents No. 1 and 2, learned Trial Court allowed the application filed by the respondents No. 1 and 2 and dismissed the execution petition filed by the petitioner, against which present petition has been filed.

3. Preliminary objection has been raised by the respondents No. 1 and 2 to the effect that writ petition is not maintainable and it is only revision petition u/s 115 of CPC is maintainable. Reliance is placed by the learned Counsel for the respondents No. 1 and 2 on a decision in the matter, of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, wherein Hon"ble Apex Court held that cases where remedy of appeal not provided for against orders/judgments of District Judge, the remedy to file revision u/s 115 CPC and cases where remedy of revision is expressly barred by State enactment in such case a writ petition would lie. Learned Counsel further placed reliance on a decision in the matter of Parkash Chand Vs. S.S. Grewal and Others, wherein in a case of dismissal of public servant Full Bench of Punjab & Haryana High Court held that decree of Civil Court declaring order of dismissal as void and treating him to be still in service, decree to be construed as enjoining upon Government to reinstate decree-holder and grant him all benefits and privileges.

4. On merits learned Counsel submits that since it was a declaratory decree and there is nothing on record to show that the salary was being paid to the petitioner at the relevant time when the services were terminated, therefore, no amount can be awarded in execution proceedings. For this contention reliance is placed on a decision in the matter of State of M.P. Vs. Mangilal Sharma, . It is submitted that the petition be dismissed.

5. Learned Counsel for the petitioner submits that since objections filed by the respondents No. 1 and 2 was dismissed, therefore, writ petition is maintainable. Learned Counsel further submits that in the matter of Mangilal Sharma (Supra), on which the reliance is placed by the learned Counsel for the respondents No. 1 and 2, neither there was any prayer for reinstatement nor it was prayed that decree of back wages be awarded, therefore, in that circumstances, the Hon"ble Apex Court has passed the judgment which is quite distinguishable. It is submitted that the petition filed by the petitioner be allowed and the impugned

order be set aside.

6. It is true that by the impugned order the execution petition filed by respondent Nos. 1 & 2 was dismissed by the learned Court below and in the matter of Sadhana Lodh (supra) the Hon''ble Apex Court has held that in the case where remedy of appeal is not provided against the order/judgment of District Judge, the remedy available to aggrieved person is to file revision u/s 115 CPC. But in the present case the revision is not maintainable because of proviso of section 115 of CPC which has been inserted by "amendment w.e.f. 1.7.2002 which reads as under:--

Section 115. Revision.--(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears --

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit: Provided that the High Court shall not under this section vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

7. It appears that since the amendment whereby proviso was inserted on 1.7.2002 and the judgment passed in Sadhana Lodh (Supra) by the Hon''ble Apex Court was dated 24.1.2003, therefore, proviso to section 115 CPC could not be brought to the notice of Hon''ble Apex Court. Since if the petition is allowed, then it would not finally dispose of the execution petition filed by petitioner, which was dismissed by the learned Court below, therefore, revision petition is barred and is not maintainable against the impugned order. In view of this, preliminary objection raised by the petitioner cannot be allowed to uphold.

8. Coming on merits, the suit was filed by the petitioner on 9.8.1994 in which it was alleged that the petitioner is in service of respondent No. 1 vide order dated 23.7.1988 and the service of petitioner was illegally terminated by respondent No. 2 on 16.1.1991. In the suit it was prayed that respondent Nos. 1 & 2 be restrained to appoint any other person on the post of Waterman except the petitioner and petitioner be awarded the arrears w.e.f. 27.7.1990, The suit was

contested and was decreed vide judgment and decree dated 31.1.2007. In the judgment it was observed that it is declared that the petitioner is still working on the post of Gardener (Waterman) and is entitled for all the benefits of the post. This decree was maintained in the appeal filed by respondent Nos. 1 & 2 in FA. No. 17/07 as the same was dismissed on 16.1.2009 and was further maintained in SA. No. 150/09 whereby appeal filed by respondent Nos. 1 & 2 was dismissed on 3.12.2009. Thereafter the execution petition was filed by the petitioner in which petitioner has claimed a sum of Rs. 7,00,000/- towards arrears of salary from the date of his dismissal till the date of filing of execution petition @ Rs. 6,000/- per month.

9. In the matter of Mangilal Sharma (Supra) the employee was employed as clerk in the irrigation department and was posted at Gandhi Sagar from where he was transferred to Jabalpur. The employee does not join his duty and remained present at his home town, the employer assumed that the employee has voluntarily resigned from his service as he continuously remained absent from his place of taking over the charge of his post for more than five years, thus the services of employee stood terminated. Thereafter employee filed the suit for declaration against the employer alleging that he continued to be in service which was decreed and in the decree it was held that the suit is decreed with cost by declaring that the employee is still in continues service of defendant and his services are not terminated. In this context Hon''ble Apex Court has observed that the executing Court is bound by the terms of decree and cannot add or alter decree on its notion of fairness or justice.

10. Hon''ble Supreme Court in the Mangilal Sharma (supra) has taken into consideration the law laid down by the Full Bench of Punjab & Haryana High Court in "the matter of Parkash Chand (supra) wherein it was held that a declaratory decree cannot be executed as it only declares the rights of decree holder qua the judgment-debtor and does not in terms, direct the judgment-debtor to do or to refrain from doing any particular act or thing. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command. The decree-holder is free to seek his legal remedies by way of suit or otherwise on the basis of the declaration given in his favour and the Supreme Court observed that it is a correct statement of law except that it may not be fully applicable in the case of a Government servant who acquires a status and his service conditions are governed by statutory rules as noticed above.

11. In the present case the execution petition could not have been dismissed only on the ground that the decree which the petitioner was having was declaratory decree. Since it was also decreed that the petitioner was in the job and is entitled for all the benefits therefore, learned Executing Court was not justified in dismissing the execution petition filed by petitioner. Since there is nothing on record on the basis of which it can be said that the petitioner is entitled for arrears (c) Rs. 6,000/- per month and also nothing has been stated

by the petitioner in his plaint or in the judgments by all the three Courts about the wages which the petitioner was getting, therefore, before proceeding further the executing Court shall ascertain the amount of salary which the petitioner was drawing, for which add can be taken by the executing Court from the record of Civil Suit which must be containing the order of appointment dated 23.7.1988. With the aforesaid petition stands allowed and impugned order stands set aside.