

(1997) 05 DEL CK 0002

In the Delhi High Court

Case No : First Appeal No. 245 of 1994 and Civil Miscellaneous Appeal No. 4724 of 1996

Delhi Development Authority

APPELLANT

Vs

Behari Parshad

RESPONDENT

Date of Decision : 01-05-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2, Order 14 Rule 2(2)
Industrial Disputes Act, 1947 — Section 25

Citation : (1997) 42 DRJ 192

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : Apurab Lal and Ramesh Kumar, for the Appellant;

Judgement

Jaspal Singh, J.

(1) The learned Civil Judge framed a preliminary issue with regard to jurisdiction of the civil court and dismissed the suit holding that the matter related to the exclusive jurisdiction of the Labour Court under the Industrial Disputes Act. However, the view so taken did not find favor with the learned Additional District Judge. He thus accepted the appeal. Dissatisfaction with the order of the 1st Appellate Court has led to this Appeal.

(2) The facts are not taxing. The respondent who claims to be a regular employee of the Delhi Development Authority has been transferred to the employment of the Municipal, Corporation of Delhi. He says the Dda could not do it because of his service conditions and that, in any case, the order affects adversely his seniority and chances of promotion. Hence, his suit for declaration that he could not be so transferred and for injunction restraining the Dda from implementing the order.

(3) In response to the suit though the Municipal Corporation preferred to stay away from the proceedings, the Dda filed its written statement contesting the

suit on various grounds. However, what needs to be emphasised is that in the pleadings it was nowhere alleged by either of the contesting parties that the present respondent who was the plaintiff before the trial court was a workman within the meaning of the Industrial Disputes Act. It was also not alleged that Dda was an industry. There was also nothing in the pleadings that the dispute raised by the plaintiff fell within the ambit and scope of an industrial dispute within the meaning of the Industrial Disputes Act or that the jurisdiction of the civil court was barred. It was only at the time of the framing of the issues that it was contended by the learned counsel for the Dda that the Dda being an industry and the plaintiff being a workman, the dispute ought to have gone to the Labour Court. This prompted the learned trial Judge to frame the following preliminary issues:

WHETHER the Civil Court has jurisdiction to try the present suit?"

(4) And, after observing that the preliminary issue so framed was "a legal issue" and as such required no evidence, the learned trial Judge proceeded to hear the parties and to hold, to put it briefly, that since the plaintiff was a workman and the Dda an industry and as the dispute related to conditions of service, Therefore, the civil court had no jurisdiction. The 1st appellate court, however, took the view that the relief claimed by the plaintiff did "not relate to enforcement of any right created by Industrial Dispute Act or by any other statute" and, Therefore, the jurisdiction of civil court was saved.

(5) As per the learned counsel for the appellant Dda the 1st appellate court went wrong in its conclusion as it did not take into account Section 25Ff of the Industrial Disputes Act which, according to him, does create a legal right to transfer the respondent. He submits that the entire case of the Dda is based on the said provision and that as the management of the undertaking stands transferred to the Municipal Corporation of Delhi, Therefore, the civil court would have no right to intervene and interfere.

(6) The learned counsel for the respondent however, has raised objection to the very framing of the preliminary issue. As per him as the Dda had to where in its written statement challenged the jurisdiction of the Civil Court, it was not open to the learned trial judge to frame the issue. His second contention is that even otherwise the issue so framed could not be treated as a preliminary issue because what was raised was not a pure question of law. On merits his contention is that the contract of service being between the Dda and the respondent and the respondent being a regular employee of the Dda, his transfer is against the terms and conditions of service. It is also his case that Section 25Ff cannot be applied inter alia on the following grounds: (a) No such plea was taken either in the pleadings or before the trial court and the 1st Appellate Court; (b) What has been transferred is not an "undertaking"; (c) there has been no transfer of "management" as it still remains with the DDA; and (d) that the alleged transfer is neither "by operation of law" nor as a result of any "agreement".

(7) Time now to come into grip with the contentions raised.

(8) Rule 2 of Order 14 of the CPC as it stands after amendment in the year 1976, is as follows:

"14(2)(1)Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-Rule(2), pronounce judgment on all issues. --- *** --- (2)Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to--

(A)the jurisdiction of the Court or

(B)a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

The provision makes it clear that though the issue as to jurisdiction may be an issue of law or fact or a mixed issue, the court is obliged to try the issue of jurisdiction as a preliminary issue only when it is an issue of law. Where an objection in regard to jurisdiction of the court rests on certain factual allegations and thus does not pertain to inherent lack of jurisdiction, it cannot be treated as an issue of law for the obvious reason that a finding on it would depend upon adjudication of a factual controversy. Was the preliminary issue framed by the learned trial Judge an issue of law capable of being decided without recording of the evidence? Before I venture to answer this question, yet another question will have to be answered first, and it is: Could the issue be framed in the absence of any Objection in the written statement with regard to jurisdiction of the civil court? Undoubtedly, in the pleadings it was nowhere alleged by the Dda that it being an industry and the plaintiff being a workman and the question of transfer etc. being related to the enforcement of a right or an obligation created under the Industrial Disputes Act, Therefore, the jurisdiction of the Civil Court was barred. But then it appears that on the day when the learned trial Judge was to frame issues, the learned Counsel for the Dda did contend that the Dda being an industry and the plaintiff being a workman, the dispute raised was an industrial dispute and thus beyond the jurisdiction of the civil court. Though, it is not on record but I am informed that the plaintiff did not challenge at that time the assertion that he was a workman and the Dda an industry. Even otherwise, the pleadings of the parties were sufficient to prima facie lead to such an inference. Could the court, under the circumstances, proceed to frame a preliminary issue with regard to its jurisdiction, assuming that it raised a question of law? I do feel that in appropriate cases it would be well within the power of the court to raise an issue of law though not put forward in the pleadings. However, in the present case, the objection with regard to jurisdiction of the court was admittedly raised by the learned counsel for the Dda at the time when the court was considering

the matter with regard to framing of issues. Undoubtedly, the pleadings are important and the parties cannot be allowed to travel beyond their boundaries and to set up a case wholly inconsistent therewith but then silence of the parties cannot invest the court with the jurisdiction which it otherwise does not have. Similarly, absence of any objection regarding jurisdiction would not debar the court from asking to be satisfied on the matter. Salutary rule with regard to pleadings notwithstanding, such a departure or variation would always be permissible. In any case Order 14 rule 3 of the CPC squarely meets the challenge. It says:

"14(3)The Court may frame the issues from all or any of the following materials:-

(A)allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(B)allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(C)the contents of documents produced by either party."

In the present case allegations with regard to jurisdiction of the civil court were made by the learned counsel for the respondent and prima facie material was already there to show that Dda was an industry and the plaintiff a workman. It was thus open to the learned trial Judge to frame an issue with regard to jurisdiction. However, the main question still remains: Could the Court treat the issue of jurisdiction as a preliminary issue? Or, in other words, did the issue raise a pure question of law? As already noticed an issue relating to jurisdiction can be tried as a preliminary issue only if it be an issue of law. Is it ? As already noticed above, the Dda has now challenged the jurisdiction of the Civil Court solely on the ground that it is an industrial dispute relating to enforcement of a right created by Section 25Ff of the Industrial Disputes Act and that consequently the only remedy available to the respondent is to get an adjudication under the Act. Section 25Ff of the Act is as under :

"25-FF.Compensation to workmen in case of transfer of undertakings WHERE the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman and been retrenched:

PROVIDED that nothing in this section apply to a workman in any case where there has been a change of employers by reason of the transfer, if--

(A)the service of the workman has not been interrupted by such transfer;

(B)the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable

to him immediately before the transfer; and

(C) the new employer is under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

Since it is contended that by the order of the Lt. Governor transferring the services of 124 colonies to the Municipal Corporation of Delhi was u/s 25Ff of Act, let us have a look at the said order also. It is in following terms :

"LT. Governor,. Delhi has been pleaded to order that services (Roads, water supply system including Internal Network & Boosting Installations, Tubewells & pump House, Sewerage, S.W. Drainage, street Lighting, E & M installations and Horticulture of 158 colonies, Group Housing Pockets and Commercial Centres as per List `C' shall stand taken-over by Delhi Municipal Corporation from Delhi Development Authority w.e.f. 1.2.1993."

Going back to Section 25FF, to get it attracted following need to be proved as far as the question of transfer is concerned: (a) There must be an undertaking: (b) The ownership or management of that undertaking must have been transferred: (c) The said transfer must have been either by an agreement or by operation of law. I am told by the learned counsel for the Delhi Development Authority that what has been transferred by the order of the Lt. Governor is the management of an undertaking. As per him the Dda runs several industries and business which are separate and distinct and that the order of the Lt. Governor relates to one such distinct and separate business of the Dda and thus Section 25Ff is attracted. However, to be fair to him, he does concede that the order of the Lt. Governor does not show that the Dda is running several industries or business distinct and separate from each other and that what has been transferred is one such distinct and separate business. The learned counsel for the respondent however, has contended that what has been transferred by the order of the Lt. Governor is merely the "services" and not the "management" and that, in any case, the order of the Lt. Governor does not relate to an undertaking". To show that Section 25FF is attracted the Dda will have to prove that what has been transferred is not merely a department or branch of the business run by the Dda or the "services" as contended by the respondent but the management of a business or industry which is distinct and separate. In short thus, the question as to whether the alleged transfer attracts Section 25Ff must ultimately depend upon the evaluation of several factors and surely (and admittedly also) it cannot be answered by looking only at the order of the Lt. Governor which, in fact, is hardly of any assistance on the points discussed above. This, however, is still not the end of the matter. In order to attract Section 25Ff the transfer has to be either by means of an agreement or by operation of law. The learned counsel for the Dda submits that the transfer took effect on account of an agreement. If so, the agreement has to be proved, more so if, as in the present case, it is not admitted. The learned Counsel seeks to rely upon the order of the Lt. Governor,

but then, it does not even obliquely refer to any agreement. What I am trying to emphasize is that whether or not the transfer in question attracts the provisions of Sec 25 Ff cannot be determined without recording of evidence. And, once this position is accepted, the question as to whether the civil court has the jurisdiction or not ceases to be purely a question of law. And, if that be so, the learned trial Judge could not treat the issue as a preliminary issue. No other point having been agitated before me. I feel that, in the interest of justice, the only option open to me is to direct the learned trial Judge to proceed to frame other issues also and to try the issue of jurisdiction Along with them. This would amount to washing away the order of the learned trial judge and so also of the 1st appellate court on the preliminary issue. I may also mention that the learned counsel for the Delhi Development Authority feels that he may have to apply for amendment of the written statement. It would be open to the Dda to move any such application, if so advised. The appeal thus stands disposed of in terms of what has been noticed above. No order is made as to costs. The parties are directed to appear before the learned trial judge on 12th May, 1997. Till then the order of transfer of the appellant, if not implemented so far, shall remain in abeyance. Parties are left to bear their own costs.