
(1994) 08 BOM CK 0014
In the Bombay High Court
Case No : Short Cause Suit No. 332 of 1978

Devi Kewalram Madrani of Bombay	Vs	APPELLANT
Premier High School and Others		RESPONDENT

Date of Decision : 04-08-1994

Acts Referred:

Constitution of India, 1950 — Article 311
Contract Act, 1872 — Section 73
Limitation Act, 1963 — Article 55, 3
Specific Relief Act, 1963 — Section 14

Citation : (1995) 3 BomCR 229

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : S.A. Gandhi and Jayashree Nambiar, instructed by Vinod Mistry and Company, for the Appellant; Satish Shah and Ramesh Chandra, for the Respondent

Judgement

R.G. Vaidyanatha, J.—This is a suit for declaration and for consequential reliefs regarding plaintiff's services as a teacher in the first defendant school. The first defendant school is run by a partnership firm of which defendants Nos. 2 and 3 are partners. During the pendency of the suit, the second defendant died. His legal representatives have come on record. Defendants have filed a written statement contesting the suit. Issues have been framed. Plaintiff examined herself and closed the case. Two witnesses are examined on behalf of the defendants including the third defendant. I have heard Advocates appearing for both the parties.

2. The plaintiffs case stated briefly is as follows :-

The plaintiff was working as a permanent teacher in the first defendant school which is run by defendants Nos. 2 and 3. Defendant No. 3 is the Principal of the said school. It is the plaintiffs case that on 20th January, 1975, she orally applied for leave to the defendant No. 3 since she had to go to Nasik for performing

religious ceremonies in connection with the death of her mother. The third defendant orally granted leave, but asked her to send an application, Plaintiff left for Nasik on the next day and sent leave application with somebody. Since the application was refused by the school, it was later sent by registered post. Even the registered cover has been returned unserved. Plaintiff reported for duty after returning from leave on 27th January, 1975. When plaintiff wanted to join the school on 28th January, 1975, the third defendant did not allow her to do the work and was given a letter stating that she has abandoned the services. It is further stated that on 30th January, 1975, defendant No. 3 has issued a letter stating that plaintiff is dismissed from service. Then there is reference in the plaint to number of correspondence between the plaintiff, the defendant and the Education Department. The third defendant did not take back the plaintiff to service inspite of direction by the Deputy Director of Education. That the conduct of defendants in refusing to take the plaintiff to service is without jurisdiction and without any authority of law. The action of the defendants is illegal and void. The action of the defendants is done without holding any enquiry. The defendants are bound to reinstate, the plaintiff in service and are bound to pay the back wages. Though the plaint was filed asking for certain reliefs, subsequently it has been amended asking for additional reliefs. On these allegations the plaintiff now wants a decree for a declaration that the order dated 30th January. 1975 issued by the defendants is illegal and that the plaintiff should be declared to be in the service of the first defendant school. That defendants may be ordered to pay Rs. 30,554.98ps. towards arrears of salary till the date of suit. The plaintiff further wants a declaration that she continues in the service of the first defendant school and entitled to salary and other perquisites and allowances, that defendants be directed to render true and correct accounts in respect of salary and allowances which plaintiff is entitled to as per rules and to direct the defendants to make all such payments that are due to her together with interest from the date of suit till the date of payment and for costs.

3. The defence is as follows :---

It is stated that during her service, plaintiff concerned herself in various activities which were detrimental to the interest of the school. She used to remain absent continuously on one ground or the other. She had also neglected her duties as a teacher. There used to be complaints from students against the plaintiff.

It is denied that plaintiff had asked the Principal orally for leave on 20th January. 1975. It is also denied that plaintiff had sent any letter and it was refused by the School. It is asserted that plaintiff remained absent unauthorisedly from 20th January, 1975 till 27th January, 1975. It is, therefore, stated that by virtue of this unauthorised absence, plaintiff has abandoned her services. A memo had accordingly been issued to the plaintiff. It is further stated that on 30th January, 1975 when school-day function was to be held, plaintiff came there and suddenly rushed to the stage and refused to leave the stage till she was given a letter of dismissal from service. Then the Principal was almost forced to give a letter as

desired by the plaintiff to the effect that she has been dismissed from service. Though the third defendant was not willing to give such a letter, he was forced in the circumstances to give such a letter in order to allow the school function to go on smoothly. It is alleged that the said letter has been taken by the plaintiff due to extortion, intimidation, coercion and threat. It is neither valid nor binding on the defendants. Then the correspondence between the parties is admitted. It is stated that plaintiff has abandoned the service within the meaning of Clause 75.13 of the Secondary School Code. Since plaintiff herself has abandoned the service, there is no question of holding any enquiry against her. It is stated that plaintiff is an Income Tax payer and has income of her own. She was harming the reputation of the school. It is stated that the first defendant school is an unaided school. It is denied that plaintiff has continued in service. That the action taken by the defendant is fully justified and according to rules. That plaintiff is not entitled to any of the reliefs prayed for in the plaint. It is also stated that the suit is barred by limitation. That this Court has no jurisdiction to try the suit. It is also stated that if the plaintiff is directed to be reinstated, she is bound to create trouble and cause harassment and she will interfere in the proper functioning of the school. The defendants will be put to grave prejudice and irreparable loss and damage if such a relief is granted. Hence it is prayed that the suit be dismissed with costs.

4. The following issues have been framed in the suit :-

Issues

1. Whether the suit is barred by the law of limitation as contended in paragraph 2 of the written statement.
2. Whether the plaintiff proves that the service conditions of the plaintiff are subject to the rules and regulations as prescribed under the Secondary School Code for disciplinary proceedings and rules made thereunder.
3. Whether the plaintiff proves that the plaintiff had sent or caused to be sent a letter applying for leave as alleged in paragraph 5 of the plaint and that the plaintiff made an oral application to defendant No. 3 and that such leave was granted to the plaintiff.
4. Whether the defendant proves that the action of the plaintiff in remaining absent from 19-1-1975 to 27-1-1975 amounts to abandonment of service within the meaning of Clause 75.13 of Secondary School Code as applicable on that day.
5. Whether the plaintiff neglected to attend her duties as teacher in defendant School by remaining absent without obtaining prior leave from 19th January, 1975 to 26th January, 1975 and thus had abandoned her employment with the defendant.
6. Whether the plaintiff is entitled to any relief as claimed in the suit.
7. Generally.

Issue No. 1

4-A. The question of limitation has been raised in Written Statement but at the time of final hearing no arguments were addressed on this issue by the learned Counsel appearing for the defendants.

It is seen that the plaint is registered in March 1978 but we find that the plaint was actually presented in the High Court Office on 23-12-1977 with a Lodging No. 2077. The practice in this Court is that whenever the plaint, petition or appeal is filed, if the office raises any objection, then the papers will not be registered as a suit or petition or appeal, but it will be given only a lodging number. It is only after the objections are removed or are complied with, there the same will be registered as suit, petition or appeal and then a formal number will be given. Therefore, we find that though the plaint is registered as a suit in March 1978, it has been actually presented in the Court on 23-12-1977. Hence for the purpose of deciding the question of limitation, we have to take the date of filing the suit namely, 23-12-1977.

The cause of action for the plaintiff in this suit arose in the last week of January, 1975. The suit is filed in December 1977, well within three years from the date of cause of action. Hence there is no merit in the contention about the limitation and that is why the learned Counsel for the defendant did not address any arguments. Accordingly, Issue No. 1 is answered in the negative.

Issue Nos. 2 & 3

4-B. According to the pleadings the plaintiff says that her service conditions were governed by the Code for Recognition of and Grant-in-aid to Secondary Schools (hereinafter referred to as "the Code"). According to the defendants, the school is governed by its own Rules and conditions. In one breath the defendants want to say that they were governed by their own Rule but in another breath they say that they have taken action against the plaintiff for abandonment of service under Clause 75.13 of the Code. Having realised this inconsistent stand taken by defendants, at the time of final hearing, the learned Counsel for the defendants fairly concedes that the school is governed by the Code.

Therefore, we find that now it is common ground that, services of all the teachers including the plaintiff were governed by the Code which was in force in 1975. I am using this word about existing of this Code in 1975 since there are number of amendments subsequently in 1976 and 1978. Issues 2 and 3 are answered accordingly.

Issue No. 4

4-C. This is one of the vital issue between the parties. The dispute between the parties lie in a narrow compass.

The plaintiffs evidence is that she took oral permission from the Principal for going on leave on 18-1-1975 and proceeded on leave from 20-1-1975 and had

sent her application for leave through a student. Her further evidence is that since the School Officials did not receive that leave letter from the student, the said student returned that leave application to her friend Ms. Majmudar who appears to have sent it by Registered Post and even that was not received by the School. She has produced the registered postal cover and it is marked as Exhibit "B".

As against this the Principal who is examined as D.W. 1, has told the Court that there was no such oral request for leave by the plaintiff on 18-1-1975 and that she had not sent any such leave letter and no such leave letter was refused.

This is purely a question of oath against oath.

It is in evidence and also admitted that the plaintiff used to take leave with prior application and when plaintiff is in the habit of doing so, there is no reason for her to absent unauthorisedly this time.

5. Now let us for a moment accept that the plaintiff had gone on leave without applying for leave. Admittedly, she returned to the school on 27th. But it is also in evidence that 26th was a holiday being a Republic Day. It is also in evidence and is admitted position that even 27th January was declared holiday. Admittedly, the plaintiff has met the Principal on 28th. She has told the Principal that she had gone on leave and had sent leave application which has been denied by the Principal.

Now can it be said that mere absence from the School without leave application from a 20th January, 1975 to 25th January, 1975 amounts to abandonment of service as noted by the Principal in the muster roll. Great reliance has been placed by the Management on Rule 75.13 which was in force in the year 1975, of the Code which reads as follows :-

"75.13. An application for leave or extension of leave should ordinarily be made in good time before the date from which the leave or its extension is sought. If an employee does not apply within seven days of the expiry of leave, for further leave, he/she may be deemed to have abandoned service."

The first part of the rule says that an application for leave or extension of leave should be made well within time. We are for a moment not concerned with the first part. The second part under which great stress has been laid by the Principal to hold that the plaintiff has abandoned the service provides that if an employee does not apply for leave within seven days of the expiry of leave, for further leave, it amounts to abandonment of service. In my view, the second part comes into picture only when an employee has already gone on leave and remains absent after the expiry of leave for 7 days or more and without applying for leave before the expiry of the leave period. The second part of the Rule which provides for abandonment of service cannot and does not apply to the first application for leave. The reason is obvious. The Rule is that a teacher who goes on leave may indefinitely not return at all and therefore, a duty is cast on employee who goes

on leave that he should not remain absent for more than 7 days after the expiry of leave unless he files an application for extension of leave before the expiry of leave. By any stretch of imagination, the second part of the Rule on which the Management is relying, cannot be applied to the first application for leave. Therefore, the theory of abandonment of service when an employee was absent for 5 days or 6 days cannot be pressed into service at all. It is not as if the Management has no remedy at all. If a teacher remains absent unauthorisedly then the Management can issue a show cause notice and hold an inquiry and take necessary action according to the Code.

6. Even accepting the extreme position, that the plaintiff had, not applied for leave and remained absent for 7 days and more and that the latter part of Rule 75.13 applies to her and it amounts to abandonment of service, even then the Management cannot take any unilateral action.

7. As rightly argued by the learned Counsel for plaintiff, the principles of natural justice require that a show cause notice to be issued to the teacher as to why she should not be held to have abandoned the service within the meaning of Rule 75.13 of the Code and on getting reply from the teacher, necessary action should be taken. The learned Counsel for the plaintiff invited the attention of the Court to, *National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others*, where it is stated that the Rule "*Audi alteram partem*" applies even to administrative matters. The Supreme Court has stated even if there is no express provision in a statute, still the rules of natural justice require that an opportunity must be given before any action is taken on the administrative side.

Here is a case where according to the Management, the teacher was absent for seven days without applying for leave. She was a permanent teacher. She had put in more than 10 years service. If the Management found that the teacher's absence was unauthorised and wanted to invoke Rule 75.13 of the Code, it should have issued a show cause notice and then only take an action according to Code. In this case admittedly such an action is not taken.

Having heard the evidence of both P.W. 1 and D.W. 1. I am inclined to accept the evidence of P.W. 1 that she had sent a leave application and therefore, it is not a case of unauthorised absence at all. Even granting that it amounts to an unauthorised absence, the latter part of the Rule 75.13 of the Code cannot be invoked for first application for leave, but it applies only to extension of leave. My further finding is that even granting that Rule 75.13 of the Code also applies to the plaintiff, the Management could not have taken any action without issuing a show cause notice to the teacher and on all these three grounds I hold that the employee has not abandoned the service and the impugned action taken by the Management cannot be supported and it is contrary to the Rules. Issue No. 4 is answered accordingly.

Issue No. 5

8. Now main question is as to what relief the plaintiff is entitled to. The plaintiff

wants a declaration that she is entitled to continue in service, wants reinstatement in service with full backwages. The question is whether the plaintiff is entitled to such a relief, I am afraid, the plaintiff cannot get such a relief from a Civil Court.

The relief asked for by the plaintiff amounts to enforcement of a contract of service. It is a relief of specific performance of a contract of service. There is a bar to grant such a relief as we could see from section 14 of the Specific Relief Act, 1963. The section says that certain contracts cannot be specifically enforced and one such contract is mentioned in section 14(l)(b) which reads as under :-

"14.(1)(a)....

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;"

The law therefore, is clear that Court cannot enforce a contract of service in common law. In case of relationship between master and servant, a master has no doubt powers to terminate the service of a servant at any time and without giving any reason. A servant cannot get a decree for specific performance of a contract of service against the master. Of course if the order of termination is illegal or bad in law, the servant is not without a remedy, he can sue the master for damages for breach of contract. He can be compensated by granting damages for the breach of contract. But he cannot specifically enforce the contract of service.

But it may be noted that in recent times, the trend of judicial opinion is that this bar against specific performance of a contract of service does not apply to certain categories of service. The exceptions are when it pertains to a Government servant since he is covered by Article 311 of the Constitution, regarding Industrial Labourers who are covered by the Industrial Law and then employees covered by certain statutes like University Act, Local Municipalities Act etc. Except these three categories, no others can claim the relief of specific performance of a contract of service. Even then the employees whose services are terminated illegally can always maintain an action for damages for breach of contract.

9. The learned Counsel for the plaintiff invited my attention to a Full Bench decision of the Allahabad High Court in, *Vaish College Society, Shamli v. Laxminarain*, A.I.R 1974 All 1, where the Full Bench held that though a contract of personal service cannot be specifically enforced, it can be enforced in the case of a teacher or a Principal who is governed by statutory rules. No doubt this decision undoubtedly supports the case of the plaintiff but unfortunately for the plaintiff, this decision is no longer good law since the very same decision was subject matter of appeal before the Supreme Court in a case reported in, *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi*

Narain and Others, . The Supreme Court reversed the said decision of the Allahabad High Court. Few facts of that case have a direct bearing on the present case also.

That was a case where the service of a Principal of a private college were terminated by the Management as per the Rules framed by the University. Admittedly in that case there was no approval by the Vice-Chancellor. Hence it was held that the order of termination was illegal. Now in the present case also I have held that the order of termination of the service of the plaintiff was illegal. Then, on the question of reinstatement, the Supreme Court considered various previous decisions and held as follows:-

"17. On consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognized exceptions - (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."

Then the Supreme Court posed a question that even if it is held that the termination of the service of the Principal was illegal and contrary of the mandatory provisions, neither the Court has discretion to grant relief, of declaration for continuation in service and about granting reinstatement which amounts to a decree of specifically enforcing a contract of service. Then it was pointed out that the Court should not exercise such discretion in service matters unless they come within the exceptions mentioned above. The Supreme Court, therefore, refused to grant the relief of such performance and the Appeal was allowed and the suit of the plaintiff was dismissed, with an observation that whatever interim payment has already been made by the management by virtue of interlocutory orders is sufficient to compensate the plaintiff for the hardship caused to him by the illegal order of termination of his service.

10. I have also come across two more decisions of the Apex Court where similar question arose for consideration.

In a case reported in, T.A. Abdul Rahaman v. State of Kerala, an industrial employee filed a suit in a Civil Court for a declaration that the order of termination is bad and for reinstatement etc. It was held by the Apex Court that such a relief cannot be granted by a Civil Court with following observations at page 257:-

"..... It cannot be disputed that a contract of employment for personal service could not be specifically enforced and it is also clear that except the industrial law, under the law of contract and the Civil law, an employee whose services are

terminated could not seek the relief of reinstatement or backwages. At best he could seek the relief of damages for breach of contract."

Then again the same question has been considered by the Apex Court in another case reported in *Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another*, . That was also a similar case identical to our present case where the services of a teacher had been illegally terminated by the Management. The teacher had filed a suit asking for reinstatement and back wages etc. In that case the High Court had granted reinstatement and also ordered payment of backwages. The Management took up the matter in Appeal before the Apex Court. The Apex Court referred to number of earlier decisions and concluded in paragraph 17 on page 419 as follows :---

"These authorities say that a college owned by a private body, though recognised by or affiliated to a Statutory University will not become a statutory body since not enacted by or under a statute. And the dismissed employee of such institution cannot get specific performance of service contract."

Then the Supreme Court also considered the question from another angle. Even if it is to be held that the plaintiff is entitled to reinstatement, the question is whether the Court can exercise discretion in granting such a relief and that too particularly retarding an educational institution. In paragraph 19 at page 420, the Apex Court observed as follows :-

"In educational institutions, the Court cannot focus only on the individual forgetting all else. The Court must have regard to varying circumstances in the academic atmosphere and radically changed position of the individual sought to be reinstated. The Court must have regard to interests of students as well as institution."

Then the Court also took into consideration that the plaintiff had not been teaching since last 25 years in view of this litigation. Reinstatement of such a person seems to be unjustified and uncalled for.

In the present case we find that the plaintiffs services were terminated in January 1975. Now 19 1/2 years have elapsed. The plaintiff has lost touch with the subjects and the art of teaching; can we now force such a teacher on the Management? Certainly it will not be in the interests of the Management or the students to force such a teacher after 19 1/2 years. The Apex Court quoted with approval its earlier decision of the year 1976 which I have already referred to.

The learned Counsel for the defendants also brought to my notice a decision reported in 10 Calcutta Weekly Notes 571 where the Calcutta High Court has also taken a similar view that such reinstatement cannot be granted by the Civil Court.

11. In view of the above discussion it has to be held that the termination of plaintiffs service on the ground of abandonment of service by the Management is illegal but in view of the legal position, I am constrained to hold that she is not entitled to reinstatement. Reinstatement is not in the interest of the Management

and the students. The Civil Court cannot force an unwanted teacher on the Management and it will have adverse effect on the students particularly when she has lost touch with the subjects for last nearly 20 years. Plaintiff has to be compensated by damages for illegal termination of her service.

At one stage the learned Counsel for the defendants submitted that the Management can terminate the service of a permanent teacher without giving any reason as provided in Rule 77.2.1 of the unamended Code in force in 1975 and then the liability of the Management is only to pay 12 months salary or 6 months salary depending upon the employees having put in 10 years service or less. It is true that if the Management had taken the action under Rule 77.2.1 of the Code by simpliciter termination without giving any reason, the liability of the Management could have been only to give 12 months salary since the plaintiff had put in more than 10 years service.

Unfortunately, the defendants have not taken such a stand. In fact we have on record a letter written by the defendants terminating the services of the plaintiff simpliciter as per Exhibit "D" dated 30-1-1975. If the Management had relied on Exhibit "D" then probably the Management would have been on a strong ground to invoke Rule 77.2,1. But unfortunately, the Management has not taken such a stand at all. In fact, it is not relying on Exhibit "D" at all. Both in the Written Statement and in the evidence of D.Ws. 1 and 2, the stand taken is that this Exhibit "D" is not a voluntary document at all and it has come into force due to the pressure put by the plaintiff by coming on the stage just on the eve of the School Day function. In the Written Statement it is pleaded that this document has come into existence due to extortion, force, intimidation and threats used by the plaintiff on that day. Therefore, we find that the Management is not relying on Exhibit "D" at all. But the Management is relying on Exhibit "B" where they say that the plaintiff has abandoned the service. No show cause notice is issued and in any way I have already pointed out that the latter part of Rule 75.13 of the Code is not at all attracted to a case of first application for leave.

12. Now remains the question as to what compensation should be awarded to the plaintiff.

In the decision reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , the Supreme Court has pointed out that certain payments had been paid to the plaintiff in that case by virtue of interlocutory order and that amount was held sufficient to meet the hardship caused to the plaintiff.

In the decision referred to above namely; Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another, , it was pointed out that in the circumstances, the salary for three years is sufficient on account of damages.

Granting of damages for a breach of contract is provided u/s 73 of the Indian Contract Act. The explanation to section 73 provides that plaintiff in such a case should do everything possible to mitigate the damages. In the present case,

there is no plea much less evidence of the plaintiff that she has done anything to mitigate the damage. She cannot sit idle for 20 years and now ask for arrears of salary for 20 years.

Even in second decision of the Supreme Court in, *Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another*, , it is observed in para 27 on page 422 that the plaintiff has to do some service or work to mitigate the damages.

In the present case, there is no pleading much less evidence of the plaintiff to show as to what she has done to mitigate the damages. The plaint is blissfully silent on this point. We cannot expect the plaintiff to sit idle for all these 20 years. She must have done some job and she must have earned some money and then she could have asked for the loss suffered by her as a result of the illegal termination. The plaintiff is not even a married woman but a spinster, naturally she would have done some job to earn her livelihood.

We must also take into consideration about the allegations made in the Written Statement against the plaintiff about her indulging in strike etc. that is additional ground for not considering the question of reinstatement. Then we must also take into consideration that we are concerned with a private management which is running a school. He may take judicial notice that the salaries of the employees have been raised from time to time and the present salary of a teacher which the Court can take judicial notice is about Rs. 4,000/- and odd. If the plaintiff is to be paid arrears of salaries for these 20 years and that too taking into account the revised salary from time to time, it will work out to Rs. 6 to Rs. 8 lacs which may ruin the first defendant school. Hence such a drastic step cannot be taken.

Having given my anxious consideration I feel that in the circumstances three years salary would be just and reasonable to compensate for illegal termination of her service.

13. In the Schedule to the plaint at page 33, plaintiff has shown arrears of salary for last three years including rise in salary as per the Badkas Commission at Rs. 30,554.98 p. In my view this amount should be granted rounding it off to Rs. 30,000/-.

I therefore hold that the plaintiff is entitled to compensation of Rs. 30,000/- for illegal termination of her services in addition to current interest from the date of suit. Issue No. 5 is answered accordingly.

14. In the result, the Suit is decreed partly. Plaintiff is granted decree to recover a sum of Rs. 30,000/- from the defendants for illegal termination of her service as compensation with interest at 6% per annum from the date of suit till the date of payment with proportionate costs. The defendants are granted three months time to deposit this amount or to pay the same to the plaintiff. Plaintiffs prayer for reinstatement with full backwages is rejected.

Suit decreed partly.