

(1982) 11 GUJ CK 0003
In the Gujarat High Court
Case No : S.A. No. 157 of 1981

Gujarat State Road Transport Corporation and Another APPELLANT
Vs
Bhagvanji Vashram RESPONDENT

Date of Decision : 22-11-1982

Acts Referred:

Limitation Act, 1908 — Article 102
Limitation Act, 1963 — Article 56, 57, 58, 7

Citation : (1983) 1 GLR 60 : (1983) 2 LLJ 65

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Judgement

N.H. Bhatt. J.

1. A substantial question of law arises neatly in this second appeal, which was argued elaborately, extensively and at the same time gracefully by the learned Advocates M/s. Pandya and Vyas appearing for the appellants and the respondent respectively.

2. In order to understand the controversy at the base of this litigation, a few facts require to be neatly stated. The respondent-plaintiff was serving as a Conductor at the Veraval Depot in the year 1964 and earlier, in the time-scale of Rs. 80-160. On 20th October, 1964, he was alleged to have assaulted the Depot Manager of Veraval to which he was attached. He was then arrested by Police in connection with the said incident and 26th November, 1964 when he went to resume duty at the Depot, he was not permitted. On 26th November, 1964 he was given an accusation about the alleged assault. On the same day, he was asked to give his statement, which was recorded in the form of questions and answers. A tentative decision was reached and on that very day, he was given a show cause notice why he should not be dismissed from service. The plaintiff gave his reply to the second show cause notice on 27th November, 1964 and then there come to be passed the order of dismissal of the plaintiff from service. The said order is stated to be dated 27th November, 1964. Two successive

appeals were resorted to by the plaintiff, but they had come to be rejected respectively on 27th November, 1965 (one year after the date of dismissal) and on 22nd January, 1967. The plaintiff took this lying down and then filed the present suit No. 274 of 1976 on 3rd December, 1976 in the court of the Civil Judge (J.D.) Porbandar against the Gujarat State Road Transport Corporation and its Divisional Controller as the two defendants. In the suit, it was mentioned that the enquiry was a farce, it was against the principles of natural justice and the Rules of the departmental enquiry were flagrantly violated and that the order of his dismissal was void ab initio. It was further stated that the appellate orders were also bad and void because they were non-speaking. In paragraph of the plaint, the orders were illegal, unconstitutional and violative of the principles of natural justice, they were inoperative also and were not binding on the plaintiff and so the plaintiff continued to hold that post of a conductor of the Corporation and was entitled to claim all the benefits, including those of salary, right from 27th November, 1964, on which date he was factually put out of job. In paragraph 9, he stated that his salary for the period from 1st December, 1973 to 30th November, 1976 (three year's period) was coming to Rs. 8100/-. In paragraph 10, he stated that the cause of action had accrued to him from day-to-day earlier and also from 7th December, 1973 continuously. Then paragraph 12 which contains the relief clauses follows, which is reproduced below as duly translated :

"So the prayers to be sought for in this suit are :

1) the plaintiff's dismissal from the service of the Defendant-Corporation being illegal, unconstitutional and inoperative, I am continuing on that post and service and so I am entitled to the emoluments attached to that post and to all other benefits. Be it please so declared.

2) Consequently decree that the defendant should pay to the plaintiff the sum of Rs. 8100/- as the amount of salary, etc., accrued due for the period commencing on 1st December, 1973 and ending on 30th November, 1976;

3) xxxxxx

4) xxxxxx

3. The suit was hotly contested by the Corporation and one of the points specifically raised, and which the subject matter of an independent issue also, was that the plaintiff's suit was barred by limitation. The learned trial Judge decreed the plaintiff's suit by ordering as follows :

"This suit is decreed and it is hereby declared that the plaintiff still continues in the service of the same post and he is entitled to the salary and other benefits, whatever may be for the said post. And it is also hereby ordered that the defendants do pay the sum of Rs. 8100/- as claimed to the plaintiff and also to pay the costs of this suit to the plaintiff and bear their own."

4. Being aggrieved by the said judgment and decree, the original defendants had

preferred the Civil Appeal No. 13 of 1980 in the District Court, which had come to be dealt with by the learned Assistant Judge posted at Porbandar. The learned appellate Judge raised only one point for determination to the following effect :

"Whether the appellants prove that the lower court erred in holding that the order passed against the plaintiff was illegal, void, etc."

The learned appellate Judge negatived the appellant's contention, but in the course of the short discussion contained in paragraph 13, he stated as follows :

"The learned advocate for the respondent has further relied on the case of the State of Madhya Pradesh v. Syed Qumarali 1976 1 SLR 288 wherein also it has been held that such a suit is not barred by any period of limitation for the purpose of granting relief of declaration that the order is illegal, etc."

The above-quoted observation will show that through a specific point for determination was not raised by the learned appellate Judge, the question of limitation must have been debated before him. This clarification is necessitated because Mr. Vyas for the respondent-plaintiff stated before me that such a point in the form in which Mr. Pandya for the appellants raised before me was not raised before the learned appellate Judge. Even otherwise, it being a neat question of law, could be permitted to be raised for the first time before me at the stage of Second Appeal.

5. The prayers as extracted from the plaint after due translation make it once for all clear that the suit was essentially for a declaration that the plaintiff was continuing in service, though factually he was discontinued as back as on 27th November, 1964, Mr. Pandya for the appellants argued that the cause of action for a declaration that he continued in service despite the order of dismissal had, therefore, first accrued to the plaintiff on 27th November, 1964 and he having slept over that accrual of cause of action to him on 27th November, 1964 the suit was ex-facie barred by limitation as Art. 58 of the Indian Limitation Act, 1963 governs the situation. Art. 56, 57 and 58 occurring under Part III dealing with suits relating to declarations are reproduced below :-

-----	Description of
suit	Period of Time from which period limitation begins to run
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56. To declare the forgery three years	When the issue or of an instrument issued registration become or registered. known to the plaintiff.
57. To obtain a declaration three years	When the alleged that an alleged adoption adoption becomes known is invalid, or never in to the plaintiff. fact, took place.
58. To obtain any other three years	When the right to sue declaration. first accrues.
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Obviously the emphasis was laid by Mr. Pandya on the word "first" there and he submitted that the suit for a prayer contained in Clause 12(1) of the plaint was barred by limitation in so far as the suit had come to be filed on 3rd December

1976 whereas the cause of action had accrued to the plaintiff on 27th November, 1964 that is, more than 12 years after the accrual of the cause of action. Even if the date of dismissal of the departmental appeals are taken as the basis, the suit was filed about nine years after the accrual of the cause of action, if it is held to have accrued from the dates of the appellate orders. On the other hand, Mr. Vyas for the original plaintiff urged that the order was alleged to be non-est and the plaintiff was at liberty to ignore its existence and, therefore the prayer was for the situation that was available to the plaintiff on the day of the filing of the suit and earlier during the period of three years immediately thereto and the suit cannot be said to have been filed beyond the period of limitation. In other words, the submission of Mr. Vyas was that the right to get the order of dismissal inoperative as a non-est one was a cause of action accruing de die in diem or a continuing cause of action and, therefore there is no question of limitation as held by the Courts below. It is this rival controversy that is required to be dealt with and resolved in this second appeal.

6. The facts of the case as noted by me above are self-eloquent. If the plaintiff had continued in his service, despite the order of dismissal, he could very well have sated that he ignored it as the order was not affecting him adversely. It is an admitted position that on and from 27th November, 1964 he was out of employment, irrespective of what he thought himself in the regard. Though, he believed, may be justifiably, that he continued in service, the fact remains that he was not in service factually. If such a man wants a declaration that he continues in service, for him the cause of action may be said to be accruing day to day, but for a suit for declaration of this type, the starting point of limitation is when the right to sue first accrues. Had the legislature not used the word "first" in that third column, the situation would have been perhaps different. It cannot be gainsaid, in my view, that for getting a declaration that the continued in service as per his belief, which may be well grounded, the opportunity or the right to seek such a declaration had as a matter of fact arisen for him on 28th November, 1964. That was the "first" day when the right to him had accrued because of the alleged non-est character of the order. So as far as the suit for a declaration is concerned, the suit was obviously barred by limitation provided for in Art. 58 of the Limitation Act, 1963. I am not to be understood to have in any way observed that a non-est order cannot be ignored by a party sought to be hit with that order. If the situation is such as he can conveniently and without any adverse effect on his de facto prospects avoid and ignore, he can well rest on that proposition and the adverse character of the adverse non-est order on him may not come in his way, but when the order factually and effectively impinges on his alleged status, it has to be held the cause of action accrues to him "first" on that day when the evil consequences of the alleged non-est, illegal order start ensuing and that it is the starting point of limitation for a suit for a declaration and for consequential reliefs. This is the clear line of distinction between these types of cases when such non-est character of impugned order is raised before a court of law.

7. In order to obviate this difficulty, the original plaintiff had sought for an amendment of the plaint before me. He wanted that the prayer for declaration and the word "consequently" occurring at the beginning of the second prayer should not be deleted. The attempt was to make it appear on the face of the plaint that the suit was one, pure and, simple, for three years salary and for no other relief. In other words, what was a consequential prayer flowing from the first prayer was sought to be converted into the only substantive prayer, depriving the appellants of their contention that the suit, as was there, was time-barred. This sort of amendment, in my view, would change the character of the suit. A suit for a declaration with a consequential relief was sought to be converted into a suit for money alone and this was done with an oblique motive, if I may say so. There is another reason also for me not to entertain this amendment application. As already noted above, the trial court and the appellate court has given the plaintiff a declaration that he was continuing in service. The affidavit-in-reply filed on behalf of the appellants-defendants shows that taking advantage of this declaration, the plaintiff had moved the Payment of Wages Authority and had realised already a huge sum like Rs. 84,064,63. In the affidavit-in-reply, the following statement is specifically made :

"It is submitted that the authority under the Payment of Wages Act has also granted complete relief keeping in view the declaration granted by the Civil Court sought in the present proceedings."

This particular statement made on oath by the Officer of the appellant-Corporation has been left uncontroverted. At the time of the hearing of this amendment application, I had put a specific question to Mr. Vyas as to whether factually it was so or not and all that Mr. Vyas could say before me was that he was not in a position to affirm or deny that particular statement. If it was so, there was all the reason for me to act on that sworn statement left unchallenged. The affidavit-in-reply was filed as far back as on 26th June, 1982 whereas the amendment application was heard to-day, that is, about four months after the filing of the affidavit-in-reply. Had the statement in the affidavit-in-reply been in any way untrue, the plaintiff who has vigorously fought this litigation all throughout, would not have remained silent. This is the second reason that almost constrains me to reject the amendment application, which if allowed, would rob the appellants of an important plea resting on the bar of the period of limitation. So the amendment application also stands rejected by this order. I am not prepared to believe the say of the plaintiff that declaration that was sought for was superfluous and therefore, was uncalled for and so it should be ignored for all purposes. As already stated by me, the declaration was the basis of the prayer for claim for salary of three years and it cannot be divorced from the prayer for money.

8. Arguing his case further Mr. Vyas invited my attention to the judgment of the Supreme Court in the case of Sakal Deep Sahai Srivastava Vs. Union of India (UOI) and Another, . In that case, a not-est order was avoided and three years"

claim had come to be decreed. The facts of the case are set out in the initial part of the reported judgment. An employee of the North Eastern Railways was reverted from the post of Office Superintendent to that of the Assistant Office Superintendent with effect from 1st July, 1949 without holding any enquiry at all as required by the Discipline and Appeal Rules of the Railways. The case of the appellant there was that despite his formal demotion, he continued to perform the duties of an Office Superintendent, presumably because he was efficient. His appeal preferred against the said formal order of demotion had come to be accepted on 29th November, 1950 with the observation that no stigma was attached to him. The appellant then had applied to the General Manager for formal reinstatement in the post of Office Superintendent and payment of arrears of his salary, but curiously enough, the General Manager awarded him Rs. 40/- p.m. as honorarium for the additional work of Office Superintendent done by him and the Board has treated the further representation of the appellant there as not a "live issue". The suit had come to be filed after reaching the age of superannuation, but the claim was restricted to three year's period. In paragraph 6 of the reported judgment, it has been held that the impugned order of reversion could be ignored as non-est. It is to be remembered that for all practical purposes, the appellant before the Supreme Court had continued to hold the post of that Office Superintendent or a post equivalent thereto and therefore, there was no question of any adverse effect. The only question that was the subject matter of the decision of the Supreme Court was the one of limitation and the ratio is that Art. 102 of the Limitation Act, 1908 applied to the case. In that case, no doubt it was observed that the declaration was not needed for the purpose of enforcing a claim, which fell within three years. In the case on hand, declaration is sought as a matter of course and as the basis of the suit. I would reiterate that it is the substantive prayer in the suit and so there is no likeness between the case on hand and the reported judgment. The view expressed by the two Judge of the Supreme Court in this reported case has come to be dissented from by the three Judges of the Supreme Court in the case of Maimoona Khatun and Another Vs. State of Uttar Pradesh and Another, . In that case, it has been held that for money claim of wages, the cause of action accrues when the order of reinstatement comes to be passed either by the authorities themselves or at the behest of the Court of competent jurisdiction. Mr. Pandya, therefore, argued that unless there was reinstatement, a claim for money could not be entertained and was liable to be rejected as pre-mature. There is good deal of force in the submission of Mr. Pandya on this score, through the purpose that seems to have persuaded the Supreme Court to decide the point may be of different one and in a different context. The ratio of that judgment, however, is that a cause of action for a money claim under present Art. 7 of Limitation Act, 1963 (equivalent to Art. 102 of the Limitation Act, 1908) arises when the wages accrue due and the wages accrue due only when the man is factually reinstated either departmentally or judicially. So the submission of Mr. Vyas that the suit should be decreed as the one filed only for money because to that extent the prayer could be granted is difficult to be accepted. I do not agree with this

submission for two reasons. Firstly, the prayer for salary is a consequential prayer, specifically so put. Secondly, following in the case of Maimoona Khatun (supra), such a money claim by itself is to be declared as pre-mature. Looking at the prayer alone from either of the two angles, the plaintiff's suit is liable to be dismissed. Mr. Vyas however, tried to get over the effect of this judgment in Maimoon Khatun's case (supra) by submitting that it is confined to cases where the order of removal from service is not an ex-facie non-est order, I do not see any indication in that judgment that it is confined to only this type of cases and is not of general application.

9. The result is that the appeal is required to be allowed and is hereby allowed. The judgments of the trial court and the lower appellate court are hereby set aside and the plaintiff's suit is dismissed. In view of the peculiar facts and circumstances of this case, I leave the parties to bear their own costs throughout.

The Civil Application No. 1826 of 1981 for stay also stands disposed of with rule discharged therein.

10. At the request of Mr. Vyas, it is ordered that the operation of this judgment of mine shall be stayed for a period of four months from to-day, in order to enable the respondent-original plaintiff to avail himself of any further legal recourse, if he is advised to pursue.