

(1954) 02 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 46 of 1949

Jagannath Patnaik

APPELLANT

Vs

Sri Pitambar Bhupati Harichandan Mohapatra

RESPONDENT

Date of Decision : 26-02-1954

Acts Referred:

Contract Act, 1872 — Section 201, 37, 40

Citation : AIR 1954 Ori 241 : (1954) 20 CLT 505

Hon'ble Judges : Narasimham, J; Mohanty, J

Bench : Division Bench

Advocate : P.V.B. Rao and K. Patnaik, for the Appellant; P. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This is a plaintiff's appeal against the decision of the Additional Subordinate Judge of Cuttack dismissing his suit for recovery of damages for breach of contract.

2. The defendant is the present proprietor of an impartible estate known as Killa Sukinda situate in Cuttack district. The previous proprietor of the said estate was one Sri Krutibas Bhupati Harichandan Mohapatra who died on 10-12-43 and was succeeded by the defendant who is his son's son. The defendant's father predeceased his father. The plaintiff is an experienced Revenue Officer who has served in the former States of Orissa in various capacities for several years. He had also served as a Manager of Sukinda estate for some time prior to 1938 and had given full satisfaction to the then proprietor. From 1938 to the 1st quarter of 1941 he was employed in Talcher State as Sadar Sub-divisional Officer. The proprietor of Sukinda estate was however anxious to utilise his services in his estate and on 3-12-40 he wrote a letter (Ext. 1) to the plaintiff requesting him to take charge "of the management of his estate and to discharge his duties in the same efficient manner as he had done on a previous occasion. There were subsequent negotiations between the two which culminated in a contract dated

26-12-40. The proprietor handed over to the plaintiff a letter of appointment (Ext. 2) which was to the following effect:

"To

Babu Jagannath Patnaik, Government-Pensioner, Khurda, Puri (At present Sadar, S.D.O., Talcher State).

Dated Sukinda the 26th December, 1940 you are appointed Dewan of the Sukinda Estate on a monthly salary of Rs. 200/- (Rupees two hundred only).

Your services shall not be terminated during seven years to come except on proved dishonesty or misconduct.

You should join as soon as possible.

Sd/- Illegible. Raja and Proprietor, Sukinda Estate 26-12-1940."

The plaintiff's reply (Ext. 3) was as follows:

"To

The Raja Saheb of Sukinda.

Sir,

In acknowledging the receipt of your letter of today's date appointing me as the Dewan of your Estate, I beg to furnish Dewanship for seven years or even more, if my health permits.

I am trying my best to join as soon as possible.

I have the honour to be, Sir, Your most obedient servant, Sd/- Jagannath Patnaik. 26-12-1940."

Then the plaintiff terminated his services in Talcher state and joined Sukinda Estate as its Dewan on 17-5-1941. During the lifetime of the previous proprietor everything went on smoothly and the plaintiff discharged his duties as Dewan to the full satisfaction of his master. But when the proprietor died on 10-12-1943 and was succeeded by his grandson (the defendant) troubles seem to have started and on 24-3-1944 the plaintiff was given notice of discharge (Ext. 2-a) in which the defendant stated that as he had applied to the Collector for taking over charge of his estate under the Court of Wards he was terminating the services of the plaintiff with effect from 1-4-1944. The plaintiff received that letter on 25-3-1944 and immediately sent a reply (Ext. 3-a) drawing the attention of the defendant to the terms of the contract of employment, under which the plaintiff was guaranteed seven years service except for proved dishonesty or "misconduct. To that the defendant replied (Ext. b-b) that under the existing circumstances he was helpless in the matter and there was no other alternative except to dispense with the plaintiff's services. The plaintiff's subsequent representation to the Court of Wards was rejected. Hence, the suit was brought

claiming salary for the balance of seven years" period originally stipulated for in the contract.

3. One of the pleas taken by the defendant In the trial Court was that the plaintiff was guilty of dishonesty and misconduct during his tenure of office as Dewan and that consequently even if the terms of the contract entered into with the plaintiff by his grandfather (Ext. 2) be held to be binding on the defendant the plaintiff was not entitled to any relief. An issue was raised on this question but at the time of argument, this issue was given up and was rightly not agitated before us.

4. Hence, the limited question for consideration by this Court is whether the terms of the contract between the plaintiff and the defendant's grandfather as embodied in Exts. 2 and 3 are binding on the defendant, Mr. Rao's argument may be summarised as follows: (i) It was an implied condition of the contract that the plaintiff should be engaged for a period of seven years irrespective of whether the proprietor of Sukinda Estate lived throughout the period. The proprietor intended that the contract should be binding on his heirs and successors-in-interest. (ii) The contract was entered into for the benefit of Sukinda Estate and would bind the present proprietor (the defendant) whether he is described as the successor of the previous proprietor or the survivor of the joint family.

5. The first question, however, is of paramount importance inasmuch as if it be held that it was an implied condition of the contract that it should subsist only during the lifetime of the promisor and the promisee the second question would not arise for consideration at all.

6. The learned lower Court proceeded on the assumption that the contract was between principal and agent and that consequently under S. 201, Contract Act, the agency terminated on the death of the principal or the agent. Here the lower Court has obviously committed an error. A Dewan of a zamindari may perform some of the functions of an agent on behalf of the zamindar. But the relationship between him and the zamindar is essentially that of master and servant or employer and employees and the general principles regulating contracts of employment between master and servant would, therefore, apply and not the principles dealing with the contract between principal and agent.

7. The English Law on the subject is well settled. As early as 1869 in the well-known case of -- "Farrow v. Wilson", (1868) 4 CP 744 at p. 745 Willes J. observed:

"In this case our judgment is for the defendants. Generally speaking, contracts bind, the executor of administrator, though not named. Where, however, "Personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is

obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally by the death of the master the servant is discharged of his service, not in breach of the contract, but by implied condition."

This has been followed in innumerable later decisions including -- "Graves v. Cohen", (1929) 46 TLR 121 (B), where also it was pointed out that it was the implied condition of an agree--ment for personal service that the death of either , party would dissolve it. I may in this connection refer to pp. 1151 and 1177 of Chitty on Contracts (12th edition) where the same principle has been reiterated.

8. Mr. Rao however contended that where personal service is involved as stated above there may be cases where though the contract may be dissolved by the death of the employee it may not be dissolved by the death or dissolution of the employer. In support of this he relied on --"Phillips v. Alhambra Palace Co.", (1901) 1 KB 59 (C). In that case the employer was a partnership firm and it was held that so far as the employer was concerned the contract was not of such a personal character as to be terminated by the death of a partner of the firm. Cases where the employers are either a firm of partners or corporate bodies, however stand on a slightly different footing and there may be several instances where contracts of personal service entered into between such employers and employees may not involve the continued existence of the employer during the period of the contract. This distinction was brought out in -- "(1929) 46 TLR 121 (B)" where it was observed: "A partnership case may involve rather different considerations."

9. The question ultimately turns on a true construction of the contract and the ascertainment as to whether it was one of the implied conditions of the contract that the contracting parties should live throughout the period of the contract. For that purpose the following observations of Lord Alverstone C. J. in -- "1901 1 KB 59 (C) at p. 62" are helpful:

"The principle of law, however, seems to be that it must be determined in each case whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party..... If in any particular case the contract is one which has relation to the personal conduct of the contracting party, then the death of that party puts an end to the contract; if, on the other hand, it has no such relation, the death of the contracting party has not that effect."

10. It is true that the aforesaid principle of English Law of contract relating to master and servant has not been expressly incorporated in the Indian Contract Act. But in the second para of Section. 37 of that Act it is stated:

"Promises bind the representatives of the promisors in case of the death of such promisors before performance, "unless a contrary intention appears from the contract"."

Similarly, in Section 40 it is stated that if from the nature of the case it appears that it was the intention of the parties that the promise should be performed by the promisor himself his representative will not be competent to perform the same. Thus in the Indian Contract Act also it is stated expressly that the question is one of ascertaining the true intention of the parties. The English decisions dealing with contracts of personal service have been referred to in the commentaries under these two sections in Pollock and Mulla on Indian Contract Act and there seems therefore no doubt that the principle laid down in those decisions as regards the implied condition in cases of contracts of personal service would apply with equal force. Mr. Rao relied on a recent decision of the Supreme Court reported in -- Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, and urged that the principles of English Law of Contract should not be applied too literally in construing the provisions of the Indian Contract Act. As a broad proposition of law this argument may be right. But in construing Sections 37 and 40, Indian Contract Act, there is no special reason as to why the principles of English Law as regards contracts between master and servant may not be applied in ascertaining the true intention of the parties.

11. The whole question, therefore, resolves itself into whether at the time when the plaintiff and the previous proprietor of Sukinda Estate entered into a contract on 26-12-1940 it was implied that the contract should subsist only during the life-time of both of them. The plaintiff was specially selected for the post in view of his proved ability as shown by his previous record of service and the special confidence reposed in him by the previous proprietor. The relationship between the Dewan and the proprietor of an impartible estate is of a somewhat intimate and personal nature though much of the work of the Dewan is connected with the administration of the estate.

No Dewan will be able to discharge his duties unless he is able to adjust himself to the whims and caprices of the proprietor. The then proprietor was an old man aged about 72 years when he entered into the contract. The plaintiff knew him well from before having served as a Manager on a previous occasion. It is a fair inference to make that the plaintiff agreed to serve him for "seven years because knowing the nature of the previous proprietor he did not anticipate any difficulty in the discharge of his duties. It was urged that the advanced age of the previous proprietor and the reasonable anticipation of his death in the near future would justify the inference that when the plaintiff agreed to serve him for seven years it was intended by the parties that the agreement should subsist even after the death of the previous proprietor.

The obvious answer to" that argument is found in the plaintiff's age itself. The plaintiff also was aged 65 years at that time and notwithstanding such an advanced age he expected to live at least for seven years more and hence bound himself to serve that estate for that period. Hence, there is no special reason as to why we should assume that when the proprietor entered into the contract in 1940 and bound himself to engage the plaintiff for seven years he expected that

he would not live for that period.

There is no evidence to show that the proprietor was then suffering from any serious illness or else that his death was anticipated by people who knew the condition of his health. The plaintiff also in his evidence did not state that he was led to believe either from the conduct of the proprietor or from his health and other circumstances that the proprietor may not live for the stipulated period of seven years. I am, therefore, of the opinion that in view of the close and confidential relationship between the proprietor of an impartible estate and his Dewan and the previous knowledge by both the contracting parties of the merits and abilities of the plaintiff on the one hand and the nature and temperament of the proprietor on the other, the contract is one which has relation to the personal conduct of both the contracting parties and the death of either of them puts an end to the contract.

The plaintiff has not stated on oath to the contrary, nor did he while obtaining the letter of appointment (Ext. 2) from the previous proprietor insist on the insertion of a provision to the effect that the contract should subsist even though the proprietor may not live throughout the stipulated period. On the other hand, his admission in cross-examination was to the following effect:

"There was no talk at the interview between the late proprietor and myself that the heirs of the proprietor would also be bound by the terms of the contract of appointment."

This answer supports the view that at the time of the contract neither party was thinking of the contingency that may arise if the proprietor dies during the period of the contract. On the meagre materials available in this case it cannot be fairly inferred that the parties to the contract contemplated that it should continue after the death of the employer. On the other hand, it appears more probable that they presumed that the state of things which existed in 1940 would continue for the stipulated period of seven years and it was with reference to that presumption alone that they entered into the contract. The principles of English law dealing with contracts of personal service would therefore apply with full force and the contract should be held to be dissolved by the death of the previous proprietor.

12. In view of this finding it is unnecessary to discuss the second question raised by Mr. Rao as to how far a contract of this type entered into by the proprietor of an impartible estate in North Orissa would bind his successor.

13. Mr. Rao then urged that even if the contract of 1940 be held to have been dissolved by the death of the previous proprietor a fresh contract on the same terms was entered into between the plaintiff and the defendant when the latter succeeded to the estate on 10-12-43. In support of this argument he relied on the admitted fact that the plaintiff was retained in service by the defendant from the date of the death of his grandfather (10-12-1943) till the end of March, 1944 and was allowed to draw his monthly salary in accordance with the terms of the

original contract. He also relied on the evidence of the plaintiff (P. W. 2) to the following effect:

"After the death of the late proprietor, the defendant, his mother and his uncle requested me to continue in service as Dewan as before. The defendant was aware of the terms of my appointment under the late proprietor."

Mr. Rao urged that the conduct of the defendant in retaining the plaintiff for a period of more than three months after the death of his grandfather and paying the monthly salary in terms of the previous contract and requesting the plaintiff to continue as Dewan of the estate as "before" would suffice to prove the fresh contract entered into between the parties. This argument is undoubtedly attractive but unfortunately no specific issue as to whether a fresh contract was entered into after the death of the previous proprietor was raised. Even in the pleadings such a case was not put forward. Apart from the oral testimony of the plaintiff quoted above there is nothing else to support it. Moreover, on 27-3-1944 (Ext. 3-a) when the plaintiff sent a reply to the defendant on receiving his notice of discharge he did not invite the special attention of the defendant to the fact that after the death of the defendant's grandfather the defendant had specially requested the plaintiff to continue as Dewan as before.

On the other hand, in that reply (Ext. 3a) the plaintiff referred to the undertaking given by the defendant's grandfather in Ext. 2 making it appear as if the defendant's attention was being drawn for the first time to that undertaking then. In the plaintiff's memorial to the Court of Wards (Ext. 5) dated 8-8-1944 also there is no mention of any such undertaking given to him by the defendant on succeeding to the estate. There is thus no contemporaneous documentary evidence to show that after the death of the previous proprietor the defendant agreed to retain the plaintiff as Dewan on the same terms as before. Mr. Rao thereupon urged that a fresh issue may be framed on this point and a finding may be called for from the lower Court after giving both parties an opportunity of adducing all available evidence. I am however reluctant to allow this issue to be raised at such a belated stage in the absence of any indication either in the pleadings or in contemporaneous documents to show that there was such a fresh contract.

14. For the aforesaid reasons I would confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

Mohanty, J.

15. I agree.