

(2013) 10 GUJ CK 0049
In the Gujarat High Court
Case No : Second Appeal No. 94 of 1990

Kahandas Bhimdas Dasani	Vs	APPELLANT
Gujarat State Road Transport Corporation		RESPONDENT

Date of Decision : 24-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0049

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : M.D. Rana,s No. 1, for the Appellant; Mitul K. Shelat, Advocate for the Respondent(s) No. 1, for the Respondent

Final Decision : Allowed

Judgement

N.V. Anjaria, J.—Formulated at the time of admission of the appeal, the following substantial question of law falls for consideration in the present appeal. Whether the lower appellate court had jurisdiction and could, in law, order that the period of absence of the appellant on duty, pursuant to his dismissal till reinstatement, will be treated as period of suspension by way of penalty?

Appellant was the original plaintiff. His Regular Civil Suit No. 345 of 1984 praying to get declared the order of dismissal passed against him to be illegal, came to be dismissal on 29.01.1985. He preferred Regular Civil Appeal No. 48 of 1985 before the court of learned Extra Assistant Judge, Junagadh. The appeal was allowed by the said first appellate court by judgment and order dated 20.04.1990. The judgment and order of the trial court was set aside, and the plaintiff was directed to be reinstated in service. The plaintiff, however was aggrieved by the rest of the directions of the order, and therefore partly challenging the said judgment and order the plaintiff approached this court by invoking section 100 of the Code of Civil Procedure, 1908, preferring this Second Appeal. 1.1 The part of the directions/order in the in respect of which the appellant-plaintiff is aggrieved, and with reference to which the substantial question arises, reads,

The period of the plaintiff's absence from duty pursuant to his dismissal till the date of his reinstatement will be treated as period spent under suspension by way of penalty and the petitioner will not be entitled to any monetary benefits by way of back wages suspension allowance for the said period.

1.2 The appellant prays that aforesaid directions may be set aside, and back wages from the date of dismissal till reinstatement may be given. Setting aside of judgment and order.

2. The facts leading to the present appeal are that the plaintiff was serving as conductor in defendant corporation since last 19 years and he was a confirmed employee. He was on duty as conductor on 17.06.1983 in S.T. Bus of Rajula-Junagadh route. The line Checking staff had checked the bus on the same day at Virpur stand and it is alleged that the plaintiff delinquent did not issue tickets to 4 passengers. Report was made and chargesheet was issued to the plaintiff being Default Case No. 225 of 1983 dated 05.07.1983. A departmental inquiry was initiated against him. It was his case that the said inquiry, without affording reasonable opportunity of being heard and in violation of principles of natural justice and without proper application of mind, his service was terminated by the order dated 27.03.1984. According to plaintiff, the said order was illegal and resulted in his economic death. He instituted the suit for declaration that entire proceedings in default case No. 225 of 1983 is illegal and the order passed therein is also void and that he yet continues in service.

2.1 The defendant corporation resisted the suit of the plaintiff by filing its W.S. at Exh. 9 wherein it was contended inter-alia that the suit of the plaintiff was not true and it was not admitted by it. The Trial Court framed issues at Exhibit 11. Holding that there was no breach of natural justice and that the inquiry was valid and further that the dismissal was proper, it dismissed the suit. The appeal preferred by the plaintiff was allowed as above. While the plaintiff has preferred this second appeal against the part of the directions of the first appellate court, respondent-Corporation has not challenged the order of allowing appeal and the reinstatement of the plaintiff directed by the first appellate court.

3. Learned advocate Mr.M.B. Rana submitted that the original prayer in the suit was for declaration. The first appellate court could not have passed directions to the effect that absence of the plaintiff from the date of dismissal shall be treated as period spent under suspension. He submitted that the directions in question travelled beyond the original plaint and the relief claimed in the suit. He submitted that once the judgment and decree of the Trial Court was set aside and reinstatement was directed by the first appellate court, direction regarding payment of back wages ought to have been followed. Learned advocate for the appellant relied on the observations in paragraph 82 from the decision in M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, to contend that the impugned directions were not legal exercise of discretion.

3.1 Learned advocate Mr.Mitul Shelat appearing for the respondent-Corporation

submitted on the other hand that the first appellate court was within its jurisdiction to pass the directions of the kind contained in the operative order. He submitted that it was in other way denial of back wages. It was submitted that it was a matter of discretion with the first appellate court to grant or not to grant back wages. According to him, directions only qualified the relief regarding back wages by denying it and instead requiring that the period from dismissal till reinstatement shall be considered in a particular way. He submitted that the impugned directions could be viewed in three ways. The specific declaration sought for was not granted. Secondly, continuity of service was also not granted. Thirdly, how to treat the period in question for back wages and monetary benefits was within the discretionary realm of the Civil Court in a suit which was u/s 34 of the Specific Relief Act. He submitted that the relief u/s 34 of the Specific Relief Act was discretionary relief. He submitted that the directions were only in the nature of moulding the relief.

3.2 In support of his submission, learned advocate for the respondent relied on decision in *State of M.P. Vs. Mangilal Sharma*, to contend that a declaratory decree merely declares the right. Another decision of the Supreme Court in case of *Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta*, for again contending that decree may contain a declaratory relief without any consequential relief of monetary benefit. By placing reliance on decision in *Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others*, which was highlighted that service of the plaintiff with the Corporation was a contract of personal service and while granting relief in the suit under the provisions of the Specific Relief Act, relief of declaration was purely discretionary and the plaintiff cannot claim it as of right. From *Hindalco Industries Ltd. Vs. Union of India (UOI) and Others*, the argument was reiterated that discretion includes power to refuse relief. Learned advocate also relied on the apex decision in *Ram Sahan Rai Vs. Sachiv Samanaya Prabandhak and Another*, as also *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, being the decisions under the Industrial Disputes Act, 1947, on the basis of which it was contended that in grant of back wages there was power to mould relief. He then submitted that even if the language of the direction was not happily worded, the principle that no party should suffer on account of inaction or omission on part of the Court. He tried to substantiate the same from paragraph 21 of the decision in *A. A. Venkatasubbiah Naidu Vs. S. Challappan and Others*,

3.3 Learned advocate heavily relied on this Court decision in *Gujarat State Road Transport Corporation Vs. Jagubhai Jiwabhai Dhandhal and Another*, and submitted that the facts of that case were akin to one obtained in the present case. In that case, the appellate court had passed the following order: "The appeal is allowed. The judgment and decree of the trial Court is set aside. The plaintiff's suit is partially decreed. The plaintiff-appellant shall be reinstated in the service on or before 1/05/1985 on the same or similar equivalent post with continuity of service for all other purposes except that for back wages. The

question of back wages shall be resolved by treating the period of absence of duty against his leave account till the entire account is exhausted and on all types of leave exhausted, the further period of absence, if any, shall be treated as leave without pay.

4. Disposing the last contention of learned advocate for the respondent first, applying the principle that no party should be forced to suffer because of the omission of the Court to act according to the procedure, as was observed in *A. Venkateshsubbiah Naidu* (supra) was wholly misconceived. This principle operates in altogether different context. It cannot be employed to justify the direction in a judgment under challenge to support even if it is otherwise not sustainable in eye of law. In the present case, the first appellate court has directed to treat the period starting from dismissal to reinstatement as period under suspension by way of penalty. In other words, it was a penalty of not granting any suspension allowance or other monetary benefits for the interregnum. On the bare reading, it was a stigmatic direction. The words and language in a judicial order does matter, and they matter materially because they reflect upon and determine the rights and obligation in law of the parties.

4.1 The next argument was that the suit of the plaintiff for declaratory relief was one u/s 34 of the Specific Relief Act, 1963 and the relief available under it was a discretionary relief. The realm of the discretion to be exercised u/s 34 while granting the declaration as to the status or rights does not extend to the area which is unconnected to the declaration sought for. The discussion does not extend to passing any other relief, which could not be said to be consequential to the declaratory relief, while granting or denying the declaration prayed for. In a suit for declaration that the order of dismissal was illegal, with consequential prayer of reinstatement with back wages, by no stretch of legal logic, such relief could comprehend within itself a direction of the nature passed by the first appellate court. The directions passed were with regard to treating the suspension period as penalty in particular way.

4.2 In *Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and Another*, the Supreme Court observed that grant of declaratory relief under the Specific Relief Act is discretionary in nature. A Civil Court can and may in appropriate cases refuse a declaratory decree for good and valid reasons, which dissuade the Court from exercising its discretionary jurisdiction. What is suggested is that nature of the relief available u/s 34 is discretionary and the Court may refuse it by exercising discretion in facts of a case. Discretion to grant or to refuse the relief is altogether different from the discretion exercised for moulding the relief. The moulding of relief has a legal connotation, in adopting the exercise of moulding the relief, the Court has to be guided by the principles regarding moulding of relief. The discretion available u/s 34 does not extend to mould the relief when such relief is not connected with the main relief or is not flowing therefrom or is not one of the same kind and extent the main relief is.

4.3 The contention could not be countenanced that part of or whole of the

directions in question could be connected with the denial of back wages or that it was a treatment given to the relief of back wages. Treating the period from "dismissal to reinstatement as the period under suspension by way of penalty was totally distinct from the grant or refusal of back wages. What the Trial Court did was to pass penal directions. The subject of treating the period as under suspension was not the same as treating the relief of back wages. The discretion of the Court u/s 34 of the Act cannot extend to such area and to such extent. The directions provided something which was totally not germane either to the suit relief claimed or by way of incidence to the relief claimed.

4.4 Neither it was a moulding of relief by the Court. Moulding of relief is permitted provided that the additional relief to be granted or the relief denied or to be qualified is of the same extent as the main prayer. The directions which may be issued by the relief granting Court in relation to the prayer made for moulding the relief have to flow from the principal prayer. Order VII Rule 7 of the Code of Civil Procedure, 1908, provides inter alia that the plaintiff shall state the relief specifically which the plaintiff may claim either simply or in the alternative. It further provides that it shall not be necessary to ask for general or other relief which may be given as the Court may think just to the same extent as if it had been asked for. Therefore, even in terms of Order VII Rule 7 which incorporates the principle of moulding of relief by allowing a Court to grant relief not prayed for, the condition is that it has to be "of same extent as if it had been asked for". If the question is whether the directions under consideration could be said to be of the same extent which had been asked for, the answer would be emphatically in negative.

4.5 In Shiv Kumar Sharma Vs. Santosh Kumari, the Apex Court observed that the appellate court had no power to grant relief not prayed for in the suit. The directions in question passed by the first appellate court are not only in the nature of relief not prayed for in the suit, but in passing those directions, the first appellate court intruded into altogether a different area which was neither the subject matter of the suit nor can be said to have nexus with the suit prayer.

5. The decision in Jagubhai Jivabhai (supra) may be dealt with now. The above decision may be dealt with right now. On the perusal of the aforesaid directions it was clear that the Court plainly and simply dealt with the question of back wages. Those directions could not be equated with the kind and nature of directions passed in this case by the first appellate court. In the instant case as is evidence, the directions imposed penalty by treating the period in a particular way. When such was the nature of the direction, which are quoted herein, they cannot be said to be in the nature of denial of back wages or treated the back wages or could be connected with the back wages part of the relief. Therefore, the Reliance on GSRTC (supra) was of no avail.

6. For the foregoing reasons and discussion, the part of the judgment and order of the first appellate court directing that period of plaintiff's absence from duty upon his dismissal till reinstatement will be treated by way of penalty as period

spent under suspension, could not have been validly passed in law by the first appellate Court. In that view, the following part of the order/directions are set aside.

The period of the plaintiff's absence from duty pursuant to his dismissal till the date of his reinstatement will be treated as period spent under suspension by way of penalty and the petitioner will not be entitled to any monetary benefits by way of back wages suspension allowance for the said period.

7. The rest of the judgment and order of the first appellate court is not under challenge. The same stands.

8. However, as far as the aspect of appellant-plaintiff's entitlement to back wages pursuant to the impugned judgment and decree is concerned, full back wages cannot be granted as the appellant has not worked for all these years. The following observation of the Apex Court in *Krushnakant B. Parmar* (supra) supplies the reasons:

Taking into consideration the fact that the charged officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, we are not remitting the proceeding to the disciplinary authority for any further action. Further, keeping in view the fact that the appellant has not worked for a long time we direct that the appellant be paid 50% of the back wages but there shall be no order as to costs.

8.1 In the circumstances, plaintiff shall not be entitled to full back wages, but it is directed that his service shall be treated as continuous and he will be paid 35% of the back wages for the period from the date of dismissal till his reinstatement.

9. Appeal is allowed to the extent aforesaid in the terms aforesaid. Registry shall send back the Record and Proceedings.