(2011) 06 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : LPAC No. 90-2002

Moti Lal Wattal APPELLANT

Vs

J and K Bank Ltd. and Others RESPONDENT

Date of Decision : 09-06-2011

Acts Referred:
Jammu and Kashmir Specific Relief Act, 1977 — Section 42

Citation : (2011) 2 JKJ 940

Hon'ble Judges : Sunil Hali, J;Hakim Imtiyaz Hussain, J

Bench : Division Bench

Judgement

Sunil Hali, J.—The Appellant while working as Junior Administrative Officer, which is equivalent to the post of Manager was found to have

committed gross-misconduct as defined under Jammu and Kashmir Bank Ltd., (Revised Recruitment Discipline and Appeal) Rules, 1972. In this

regard, an enquiry was initiated against the Appellant, which was preceded by issuance of charge sheet on 26.07.1973 wherein following charges

were levelled against him:

(i) Transgressing the discretionary powers for grant of temporary overdrafts;

(ii) Exercising discretionary powers of allowing temporary overdrafts even after such powers had been withdrawn; and

(iii) Committing abnormal delay in submission of advance returns/statements.

2. The enquiry was initiated by an Officer of the level of Deputy General Manager, which culminated into dismissal of the Appellant from service.

Against the dismissal order, a suit was filed before the trial Court, which came to be allowed vide order dated 07.02.1998 by granting following

reliefs:

1. That order dated 23.06.1976 of Respondent No. l's dismissal from the service of Appellant-Bank is void, illegal and in effective against the

Plaintiff;

2. Respondent No. 1 (Plaintiff) is entitled to an amount of Rs. 1,95,954/-and

3. Payment of compensation of full salary upto the date of superannuation to Respondent No. l including all monetary as well as other service

benefits to which he would have been entitled but for the passing of order dated 23.06.1976.

3. Aggrieved by the order dated 07.02.1998, Respondents-Bank filed Civil First Appeal before this Court, which came to be allowed vide

judgment dated 22.01.2001 by setting aside the judgment and decree dated 07.02.1998 passed by the trial court. Consequently suit of the

Appellant-Plaintiff was dismissed. It is under these circumstances, the present Letters Patent Appeal has been preferred by the Appellant.

4. The issues which are required to be determined in this appeal are as under:

(i) Whether in absence of rules, can a charge sheet be framed by any other person except competent authority as defined under the rules?

(ii) Mere fact that the suit u/s 21 of the Act is not maintainable, whether the Court can grant the relief in the nature of declaration u/s 42 of the

Specific Relief Act? and

(iii) While holding the order of dismissal as illegal and inoperative, is the court competent to grant compensation by way of full salary upto the date

of superannuation?

5. This in nutshell is the controversy, which is required to be determined in this appeal.

6. Before adverting to the issues, it would be apt to briefly indicate the grounds on the basis of which suit of the Appellant-Plaintiff was allowed by

the trial Court and consequently upset by the 1st Appellate Court (Learned Single Judge).

7. The trial Court while allowing the suit of the Plaintiff-Appellant found:

(a) That charge sheet framed by the Inquiry Officer on the instructions of the General Manager was in violation of the rules. On the date charge

sheet was served, Chairman had not delegated power to the General Manager to exercise any of the power under these rules, which includes furnishing of charge sheet and holding of inquiry;

(b) That since charge sheet and inquiry was conducted by an incompetent person, consequently order of dismissal was illegal and inoperative;

(c) That prayer for re-instatement could not have been granted as it would tantamount to enforce a contract of personal service. However,

Plaintiff-Appellant was entitled for compensation by way of salary which he would have drawn upto the date of superannuation.

8. The first appellate court while upsetting the findings of the trial court held as under:

(i) That in view of competent authority having delegated the power to the General Manager, charge sheet and order of dismissal could be passed

by him;

(ii) That direction of the trial court to release the salary of the Appellant-Plaintiff by way of compensation was in fact seeking performance of the

contract of personal service.

9. The issue is whether in absence of rules, can a charge sheet be framed by any other person except competent authority as defined under the

rules. The 'competent authority' is defined in Rule 5(c) of Jammu and Kashmir Bank Ltd., (Revised Recruitment Discipline and Appeal) Rules,

1972 which defines the Chairman as competent authority or any other person to whom the power is delegated by the Chairman.

10. A plain reading of the aforesaid rules reveals that the Chairman is repository of the power and such power can only be exercised by any other

authority to which same is delegated by the Chairman. In the present case, we are concerned only with chapter dealing with Discipline and Appeal

Rules. The scheme of the rules clearly envisages that all the powers are required to be exercised by the Chairman which includes any disciplinary

action required to be taken against the official(s)/officer(s).

11. It is not necessary that appointing authority alone could frame the charge or hold an inquiry against the delinquent official(s)/officer(s). As rightly

pointed out by the learned Counsel for the Respondents that framing of charge and also holding of an inquiry conducted by the General Manager,

does not visit the Appellant with any evil consequences. It is well known that departmental proceedings consists of several stages; the initiation of

the proceeding, the inquiry in respect of the charges levelled against that delinquent officer and the final order is passed after the conclusion of the

inquiry. Law is settled that power to remove a person vests with the appointing authority or an authority which is not subordinate to such authority.

However, in respect of initiation of inquiry and issuance of charge sheet, there is no such impediment. Power to serve charge sheet and inquiry in

absence of rules can be done by any person other than the competent authority. However, where rules provide that charge sheet and inquiry shall

be initiated by a particular person then that person alone has the power to hold such inquiry or dismiss the delinquent official(s)/officer(s). In the

present case as stated herein supra, the Chairman is repository of the power and he alone is competent to serve the charge sheet or initiate inquiry

proceedings against the Appellant. In case such power is delegated to any authority then such authority shall be competent to serve the charge

sheet and initiate inquiry proceedings.

12. It be seen in the present case that the Chairman vide No. JKB/CMO/76-176 dated 29.04.1976 has delegated the power to the General

Manager, who was competent to serve charge sheet and initiate inquiry against any person after 29.04.1976 and not before that. Charge sheet

was served upon the Appellant on 26.07.1973, when admittedly General Manager was not competent to serve charge sheet and initiate inquiry

against him. While dealing with similar issue, the Apex Court in P.V. Srinivasa Sastry and others Vs. Comptroller and Auditor General and others,

held as under-Article 311(1) does not say that the departmental proceeding must be initiated only by the appointing authority. However, it is open

to Union of India or a State Government to make any rule prescribing that the proceeding against any delinquent officer shall be initiated by an

officer not subordinate to the appointing authority. Any such rule shall not be inconsistent with Article 311 of the Constitution because it will

amount to providing an additional safeguard or protection to the holder of a civil post. But in absence of any such rule, this right or guarantee does

not flow from Article 311 since initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences. At

the same time this will not give right to authorities having the same rank as that of the officer against whom proceeding is to be initiated to take a

decision whether any such proceeding should be initiated. In absence of a rule, any superior authority who can be held to be the controlling

authority, can initiate such proceeding. In the present case it has not been shown that any rule prescribes that the Accountant General, who was the

appointing authority of the Appellant-Auditors, alone could have initiated a departmental proceeding.

13. While dealing with this issue, the appellate Court has proceeded on the premise that it is not necessary that competent authority alone should

hold an inquiry and frame the charges. The appellate court has not taken note of the fact that in this particular case Chairman was the repository of

the power under the rules. It was a case where rule provides that who would be competent to serve the charge sheet and initiate inquiry

proceedings.

14. The appellate court has held that such a power can be exercised by the Chairman or any lower authority to which the powers are delegated by

the Chairman. Such delegation was given on 29.04.1976 whereas the appellate court has held that the power was delegated on 29.04.1973,

which is factually incorrect. We, accordingly, hold that charge sheet and inquiry proceedings were served by an incompetent authority, as such, the

same would be vitiated on that account.

15. Other aspect of the matter is that whether the General Manager could have passed the order of dismissal when he admittedly was not the

appointing authority. The trial Court has specifically framed issue No. 3 in this behalf which reads as under

Issue No. 3.

Whether the order of dismissal is illegal, biased are unjustified and passed by an authority not competent to pass, and if so, what is its effect ?

16. While dealing with this issue, the trial court has held that appointment of the Appellant as Manager was confirmed by the Board of Directors,

which alone is competent authority to dismiss or remove him from service. It is further held by the trial court that the Chairman who has been

defined as competent authority shall exercise his powers subject to the superintendence, control and directions of the Board of Directors. Sub rule

(c) of Rule 118 of the Banking Regulation Act, 1949 lays down that subject to the provisions of any law for the time being in force, the Board of

Directors shall entrust the Chairman the management of the whole of affairs of the Bank and also delegate to him such powers as may be necessary

for carrying on the business of the Bank. This power has to be exercised by the Chairman subject to the control and directions of the Board of

Directors. Re-delegation of the delegated powers, more particularly, in respect of dismissal or removal from service cannot be done. Assuming

that the Chairman was competent to remove or dismiss the Appellant, he could not have further delegated this power to the General Manager. It is

settled principle of service jurisprudence that order of dismissal or removal can only be passed by the appointing authority or the authority which is

equivalent to the status of the appointing authority. Even though, the banking rules are not enforceable in law but the principle that appointing

authority can alone is competent to dismiss the person, has to be followed in the present case also. Rule 5(c) of the banking rules, 1972 is quoted

as under:

5(c): (i) ""Competent authority"" in relation to exercise of any power under these rules means the Chairman or any other lower authority to which the

power is delegated by the Chairman unless the power is specifically retained by the Board with itself in which case it will mean the Board;

(ii) ""Appointing authority"" means the competent authority for making appointments to the Bank's Services.

17. The import of the aforesaid rules clearly reveals that the Chairman can exercise any power being competent authority in respect of those issues

which have been delegated to him and not specifically retained by the Board with itself. In the present case, the appointment of the Appellant is

confirmed by the Board, which is the competent authority, is an issue which has not been denied by the Respondents-Defendants. Whether the

power of dismissal has also been delegated to the Chairman, nothing has been brought on record in this behalf by the Respondents-Defendants.

What, in fact, has been produced by them was the photocopy of the order delegating powers to the General Manager by the Chairman. The Bank

was required to prove in this case that all the powers including powers to dismiss or remove stand delegated to the Chairman, which has not been

done in the present case. We say so because the power of dismissal has to be exercised only by the appointing authority or any authority which is

equivalent to the status of the appointing authority. In the present case, appointing authority is admittedly the Board of Directors.

18. The first appellate court has not addressed itself on this issue as it has only restricted itself on the issue as to whether the General Manager

could have initiated inquiry and framed the charge sheet.

19. The other aspect of the matter is whether a person delegated with the powers of dismissal or removal could further delegate such powers to his

subordinate. We are fully convinced that such powers could not be re-delegated by the Chairman unless there is a specific direction given by the

Board of Directors. Accordingly, we hold that order of dismissal was passed by an incompetent authority.

20. Mere fact that the suit u/s 21 of the Act is not maintainable, whether the Court can grant the relief in the nature of declaration u/s 42 of the

Specific Relief Act. Contract of personal service cannot be specifically enforced and Court would not normally 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 recognised exceptions:

(i) where as 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.

21. It is only under these exceptions, the contract of personal service can be enforced.

22. The service conditions of the parties are regulated by Bi-partite Agreement between the Employees Union and the Bank's Management. The

rules 1972 have no statutory force, as such, the same cannot be enforced.

23. Now question that arises for consideration is where contract of personal service cannot be enforced would it be appropriate for the court to

declare the action of removal and dismissal as illegal and inoperative. The power of the court to grant declaratory decree is contemplated by

Section 42 of the Specific Relief Act. Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and

circumspects it with limitation. Where a person is found disentitle for relief u/s 21 of the Specific Relief Act, the Court will have the power to annul

its action to be illegal and inoperative while exercising its power u/s 42 of the Specific Relief Act.

24. It must be remembered that the declaration claimed u/s 42 lies entirely within the judicial discretion of the Court and is to be exercised with

caution according to the exigencies of a particular case. A party cannot, as of right claim such a declaration, because such a relief is more in the

nature of an equitable relief than a legal remedy. The relief has to be granted by the Court according to sound legal principles and ex debito

justitiae.

25. What emerges from the aforesaid discussion is that no declaration can be issued for seeking enforcement of contract of personal service but

this would not desist the court from exercising its jurisdiction to declare any action illegal and inoperative while exercising its power u/s 42 of the

Specific Relief Act. It is different issue as to whether in the facts and circumstances of the particular case such a relief can be granted as it is only in

the realm of equity such power can be exercised.

26. We are fortified in this view by the judgments of the Apex Court titled as Ashok Kumar Srivastav Vs. National Insurance Company Limited

and Others, , wherein it is held as under:

In the instant case, Appellant was appointed on certain terms and pursuant to such appointment he worked within the scope of such employment.

Termination of his employment purportedly in terms of the same contract is challenged by him by praying for a declaration that such termination is

invalid and therefore, he continues in the same employment. Maintainability of a suit cannot be adjudged from the effect which the decree may

cause. It can be determined on the basis of the ostensible pleadings made and the stated reliefs claimed in the plaint. The mere fact that a suit which

is not maintainable u/s 14 of the Act is not to persist with its disability of non admission to civil courts even outside the contours of chapter II of the

Act. Section 34 is enough to open the corridors of civil Courts to admit suits filed for a variety of declaratory reliefs. Section 14 falls within that

chapter and it points to contracts which are not specifically enforceable. Powers of the Court to grant declaratory reliefs are adumbrated in Section

34 of the Act which falls under chapter VI of the Act. It is well to remember that

even the wide language contained in Section 34 did not exhaust

the powers of the Court to grant declaratory reliefs.

27. In Executive Committee of Vaish Degree College, Shamli and Ors. v. Lakshmi Narain and Ors. reported in AIR 1976 SC 888, it is held as

under:

Per Majority. The relief of declaration and injunction under the provisions of the Specific Relief Act is purely discretionary and the Plaintiff cannot

claim it as of right. The relief has to be granted by the Court according to sound legal principles and ex debito justitiae. The Court has to administer

justice between the parties and cannot convert itself into an instrument of injustice or an engine of oppression. In these circumstances, while

exercising its discretionary powers the Court must keep in mind the well settled principles of justice and fair play and should exercise the discretion

only if the ends of justice require it, for justice is not an object which can be administered in vacuum.

28. While holding the order of dismissal as illegal and inoperative, is the court competent to grant compensation by way of full salary up to the date

of superannuation.

29. After having held that order of dismissal was illegal and in operative, it was proper for the Court to award compensation in the shape of salary.

30. The Court could not have directed reinstatement as it would tantamount to enforcement of the contract of personal service. The trial court after

having held that order of dismissal is illegal has moulded the relief by awarding salary to the Appellant as also the salary which he would have

drawn upto the date of superannuation by way of compensation. This in our view could have been done by the trial court as it was not seeking

enforcement of contract of personal service but only compensation to the Appellant for having suffered the loss and damage on account of his

illegal dismissal.

31. The Appellant was dismissed in 1976 and continued to remain without salary till date. The trial court was right in awarding the salary, which he

was entitled and also the salary which he would have drawn upto the date of superannuation. Thus, the findings of the first appellate court that

ordering release of salary, the Court has, in fact, enforced the contract of personal service, is legally misconceived. After holding that the Court could exercise its powers in declaring the action of the Respondents as illegal, it was not seeking enforcement of contract of personal service but

declaring the action of the Respondents as illegal and void abinitio.

32. The termination of the Appellant is void ab initio as enquiry initiated by the Deputy General Manager was in violation of the Bank Rules and

consequently order of dismissal passed by the General Manager was also void ab initoo. The services of the Appellant have been brought to end

by a person who was not competent to do the same. On account of this, Appellant has suffered a financial loss and his career was brought to an

end by the order of dismissal.

33. Accordingly, we find no fault in the order of trial court in awarding compensation by way of salary.

34. In view of the above, we set aside the judgment and decree dated 22.01.2001 passed by the first appellate court in CIA No. 19/1998 and

uphold the judgment and decree dated 07.02.1998 passed by the 2nd Additional District Judge, Jammu.

35. Disposed of along with connected CMP(s), if any.