

(2004) 10 MP CK 0036

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 2680 of 2003

M.P. Cancer Chikitsa Evam Sewa Samiti and Another

APPELLANT

Vs

Sanjeev Saxena

RESPONDENT

Date of Decision : 06-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 29 Rule 2, Order 29 Rule 2(2), Order 29 Rule 3

Citation : (2004) ILR (MP) 1088 : (2004) 4 MPHT 438 : (2004) 4 MPLJ 267

Hon'ble Judges : Shantanu Kemkar, J

Bench : Single Bench

Advocate : V.S. Shrotri and Ashish Shrotri, for the Appellant; Rajendra Tiwari and Udayan Tiwari, for the Respondent

Final Decision : Allowed

Judgement

Shantanu Kemkar, J.

This appeal has been filed under Order 43 Rule 1 (r) of the CPC against the order dated 17-12-2003 passed by the IV Additional District Judge, Bhopal in Civil Suit No. 282-A/2003 whereby the application filed by the respondent/plaintiff under Order 39 Rules 1 and 2 of the CPC has been allowed.

As per the appellants/defendants, the appellant No. 1 is a Society registered under the Societies Registrikaran Adhiniyam, 1973 and the appellant No. 2 Jawaharlal Nehru Cancer Hospital and Research Centre, Bhopal is being run by this registered society. The plaintiff was appointed as Marketing Manager in the hospital w.e.f. 1-4-2000 on a consolidated pay of Rs. 4,500/-per month. As per the appointment order, the appointment of the plaintiff was purely temporary on ad hoc basis with a condition that it can be terminated by giving one month's notice or salary in lieu thereof. As per the defendants the services of the plaintiff were terminated vide order dated 29-11-2003 with immediate effect and a month's salary in lieu of notice was given.

On 5-12-2003, the plaintiff filed a suit for declaration and injunction against the defendants on the ground that he threatened to be removed from services only for the reason that he wrote a letter to the Director of the defendant No. 2 hospital bringing to his notice certain irregularities of the management and asking for taking appropriate steps. In the suit, the plaintiff prayed for following reliefs :--

"(a) to declare the act of the defendants, their officers and agents in restraining the plaintiff from performing his duties as illegal and unauthorised, and

(b) to restrain the defendants, their officers and agents from giving effect to any such order of termination of service of the plaintiff and further to restrain the defendants and their officers/agents by an order of injunction not to interrupt the service of the plaintiff without following the due process of law."

The plaintiff also filed an application under Order 39 Rules 1 and 2 of the CPC claiming inter alia following relief :--

"till the decision of the said suit, the defendants, their agents and their officers be restrained from restraining the plaintiff in performing his job as Marketing Manager and further the defendants be restrained from giving effect to any such intention to terminate the plaintiff from the services without following the due process of law in the interest of justice and fair adjudication of the dispute."

The plaintiff also prayed for ex parte temporary injunction under Order 39 Rule 3 of the CPC.

The Trial Court vide its order dated 5-12-2003 allowed the application filed by the plaintiff under Order 39 Rule 3 of the CPC and restrained the defendants from terminating the services of the plaintiff without following due process of law till the next date of hearing.

The defendants filed an application under Order 39 Rule 4 of the CPC for recalling the order dated 5-12-2003 contending therein that the services of the plaintiff have already been terminated on 29-11-2003 and the plaintiff deliberately avoided to receive the termination order and made false statements in the suit and in the applications and thereby obtained ex parte ad-interim injunction. The Trial Court after hearing both the sides vide its order dated 17-12-2003 allowed the plaintiffs application filed under Order 39 Rules 1 and 2 of the CPC for temporary injunction and rejected the application of the defendants filed under Order 39 Rule 4 of the CPC. Hence this appeal.

Shri V.S. Shroti, learned Senior Counsel for the appellants/defendants has contended that the Trial Court has completely ignored the effect of the proviso to Sub-rule (2) of Rule 2 of Order 39 of the CPC inserted by Madhya Pradesh State Amendment, which imposes a ban on the powers of the Civil Court to issue injunction to stay the operation of an order of termination of service of any person appointed to public service and post in connection with the affairs of the State including any employee of any company or corporation owned or controlled

by State Government. He further contended that the appellant No. 1 is a Society registered under M.P. Societies Registrikaran Adhiniyam, 1973 and is controlled by the State Government, therefore, in view of the proviso to Rule 2 (2) of Order 39 of the CPC, no injunction could have been granted in favour of the plaintiff against his termination order. It is also contended that prior to 5-12-2003 the date of the filing of suit, on 29-11 -2003 itself the services of the plaintiff were terminated. The termination order dated 29-11 -2003 was tried to be served on the plaintiff but he refused to receive it, as recorded in the despatch register filed with the reply. On his refusal to receive the termination order it was again sent to the plaintiff by registered post acknowledgment due which also returned unserved due to non-availability of the plaintiff. He further contended that the plaintiffs appointment was purely temporary on ad hoc basis and as per the condition of the appointment order, his services were terminated. Since the services could have been terminated at anytime there is no illegality in the order of termination and as such there is no question of any prima facie case in favour of the plaintiff. He further contended that even if the defendant No. 1 is a registered society still it can not be said to be a statutory body and therefore contract of personal service can not be enforced. It is further contended that the Trial Court has ignored the basic principles for grant of temporary injunction and therefore the order is not sustainable.

In support of his submissions the learned Senior Counsel for the appellants/defendants has relied on the judgment of the Supreme Court in the case of Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi, in which the Supreme Court has held that in case of private employment enforcement of contract of personal service is barred under law. He also cited a case (1997) 11 SCC 471 in which the Supreme Court has held that "Hindu College Sonipat can not be regarded as statutory body on the basis of its affiliation to the University and, therefore, contract of personal service of its employees can not be specifically enforced".

In yet other judgment passed in case of Nandganj Sihori Sugar Co. Ltd., Rae Bareli and another Vs. Badri Nath Dixit and others, the Supreme Court has held "A contract of employment can not ordinarily be enforced by or against an employer. The remedy is to sue for damages. There are certain exceptions to rule such as in the case of a public servant dismissed from service in contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial Law, a statutory body acting in breach of statutory obligations, and the like." In support of his contention that the defendant No. 1 though is a registered society but is not created by or under any statute, therefore, a distinction has to be drawn between society merely registered as a society under the Societies Registrikaran Adhiniyam, 1973 and a society created by the statute, he relied on the judgments passed in Executive Committee of Vaish Degree College, Shamli and Ors. v. Lakshmi Namin and Ors. (AIR 1976 SC 888) and also in Bakhtawar Singh and Another Vs. Union of India (UOI) and Another, .

With regard to question as to the grant of interim relief in case of termination of

employee he relied on judgment passed in the case of (2000) 10 SCC 311 , in which the Supreme Court has held "We are not expressing any opinion as to whether the services of an employee could be terminated for not passing the shorthand and typewriting test, but we are clearly of the opinion that the High Court erred in law in staying the order of termination as an interim measure in the pending writ petition. By such interim order if an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same. We, therefore, set aside the impugned order of the High Court staying the order of termination."

Shri Rajendra Tiwari, learned Senior Counsel for the respondent/plaintiff has contended that the termination order being ex facie illegal, the Trial Court has rightly granted temporary injunction. The order of termination is mala fide and has been issued only for the reason that the plaintiff has pointed out the irregularities of the management. The plaintiff was serving since 1-4-2000 and his services can not be abruptly terminated after more than three years. It is further pointed out that the removal from service of the plaintiff is by an unauthorised person as the authority who has terminated his services is not the same authority which appointed him. He further contended that the termination order dated 29-11-2003 was not served on the plaintiff, till the suit was filed but the same was served only 11-12-2003 along with the reply filed in the Trial Court by the defendants. In support of his contentions that the termination order being ex facie illegal and is not sustainable, he relied on the judgments in the case of Shivaji Atmaji Sawant Vs. State of Maharashtra and Others, , Neeti Bhan Vs. Miss Hill Education Society and Others, and Vijay Kumar Samrath v. Director of Veterinary [1986 (2) MPWN 249]. He further relied on the judgment of this Court passed in the case of Shankarlal Debiprasad Rathore v. State of M.P. and Ors. (1978 MPLJ 419) and contended that the real thing for grant of temporary injunction has to be seen is only that plaintiffs claim is not frivolous or vexatious, in other words that there is a serious question to be tried. He accordingly submitted that the order of the learned Trial Court needs no interference.

Having considered the submissions of the learned Senior Counsel appearing for the parties and on perusal of the documents in my view the appeal deserves to be allowed. In order to decide an application filed under Order 39 Rules 1 and 2 of the CPC for grant of temporary injunction the Court is required to see whether the plaintiff has got prima facie case, whether the balance of convenience is in his favour and irreparable injury would cause to him if the injunction is not granted. If any of these three ingredients is missing the plaintiff would not be entitled to get the temporary injunction. On examination of the case keeping in mind the aforesaid principle of law, in my considered view the order of the Trial Court is not sustainable. The various judgments cited on behalf of the plaintiff in order to show that the termination order of the plaintiff is illegal and unjustified may lead to infer that the plaintiff has got prima facie case but that itself is no ground to grant of temporary injunction directing reinstatement of the plaintiff.

The judgment of this Court passed in case of Shankarlal (supra) pertains to allotment of house and it was found on the date of suit the plaintiff was in possession of the house using it as a godown. Thus in such circumstances this Court found that if the plaintiff was required to vacate and he ultimately establishes his rights claimed in the suit, he would suffer inconvenience and loss in business which could not be satisfactorily compensated by award of damages. It has been further observed in Shankarlal's case (supra) in Paragraph 4 "After the plaintiff succeeds in showing that there is a serious question to be tried, he has further to show that the balance of convenience lies in favour of granting temporary injunction. In this connection, it is relevant to enquire whether the plaintiff can be adequately compensated by an award of damages if he succeeds in establishing the right claimed. The Court should also consider whether the defendant can be adequately compensated if the plaintiff is directed to pay damages for the loss resulting to him from the grant of injunction in case ultimately the suit fails." In that view of matter this judgment is not of any help to the plaintiff, on the other hand, this judgment also lays down that all the three ingredients prima facie case, balance of convenience, irreparable loss must be established. Assuming that the plaintiff is having prima facie case in his favour but that itself would not entail him to get relief of temporary injunction, because even if there is a prima facie case, the Court has to consider whether the party seeking extra-ordinary relief of injunction could be compensated in terms of money and whether the balance of convenience lies in his favour. On consideration of the impugned order, I find that there is absolutely no consideration of other two essential ingredients which are balance of convenience and irreparable injury. The contention of the learned Counsel for the plaintiff that the plaintiff would suffer irreparable injury as his entire family is dependent on him and therefore he deserves to be granted temporary injunction so that that he can continue with service can not be accepted. For the reason that plaintiff if succeeds in the suit could be adequately compensated in terms of money by payment of back wages. In the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, the Supreme Court has deprecated the practice of granting interim order which practically give the principal relief sought in petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations. Similar is the law laid down in case of State of Haryana v. Suman Dutta (supra),

Coming to the other aspect, from the pleadings and the submissions made by the learned Counsel for the parties prima facie it is clear that the defendants are getting aid from the State Government and the defendants case is that the State Government has got "control" over the defendants. Proviso to Order 39 Rule 2 (2) of the CPC reads as under :--

"Provided that no such injunction shall be granted :

(a) where no perpetual injunction could be granted in view of the provisions of

Section 38 and Section 41 of the Specific Relief Act, 1963 (47 of 1963); or

(b) to say, the operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of, or taking charge from, any person appointed to public service and post in connection with the affairs of the State including any employee of any company or Corporation owned or controlled by the State Government; or

(c) to say, any disciplinary proceeding, pending or intended or, the effect of any adverse entry against any person appointed to public service and post in connection with the affairs of the State including any employee of the company owned or controlled by the State Government; or

(d) to restrain any election; or

(e) to restrain any auction intended to be made or, to restrain the effect of any auction made by the Government; or to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished; and any order for injunction granted in contravention of these provisions shall be void." [Vide Madhya Pradesh Act 29 of 1984. Section 8, (w.e.f. 14-8-1984)]."

The above provision of the CPC imposing ban on issuance of injunction would be attracted to the present case and therefore, no injunction could have been granted by the Trial Court. Thus on this ground also the impugned order is vitiated.

So far as the contention of the learned Counsel for the defendants that the Trial Court has erred in granting an order in the nature of status quo ante, I find that the services of the plaintiff were terminated on 29-11-2003. The order of termination was sought to be served on him on 29-11-2003 which he refused to accept. This fact finds mention in despatch register a photo-copy of which reveals that there is a note, that the plaintiff refused to accept the termination order. The order was then sent to the plaintiff by Registered Post acknowledgment due, of which postal receipt containing the date and time of sending is filed. Shri Rajendra Tiwari, learned Senior Counsel controverted the aforesaid fact and has submitted that in the absence of the letter and the envelop which was said to have been refused by the plaintiff the inference can be drawn that the despatch register has been manipulated only to deprive the plaintiff of the relief of interim injunction. After considering the submissions I am of the view that the copy of the despatch register and the copy pf the postal receipt prima facie can not be disbelieved. On the basis of aforesaid documents filed by the defendants supported by affidavit, I have no hesitation, prima facie to hold that the plaintiffs services stood terminated on 29-11-2003 and thereafter on 5-12-2003 the suit was filed, therefore, the relief in nature of status quo ante could not have been granted by the Trial Court

In State of Punjab Vs. Amar Singh Harika, relied by the plaintiff that mere passing of an order of dismissal is not effective unless it is published and

communicated to the officer concerned, also in my view is of no help for the reason that prma facie the despatch register and the postal receipt of sending Registered A.D. to the plaintiff can not be ignored as observed which are evidencing that the termination order was communicated to him.

Accordingly, this appeal deserves to be and is hereby allowed. The impugned order is set aside. Needless to say that this order will not come in the way of the Trial Court while deciding the suit on merits.