
(2009) 02 CAL CK 0090
In the Calcutta High Court
Case No : F.A. No. 175 of 1997

M/s. Bharat Barrel and Drum Mfg. Co. Ltd. and Another APPELLANT
Vs
Sri Mrinal Kanti Dutta Roy RESPONDENT

Date of Decision : 18-02-2009

Acts Referred:

Citation : (2009) 02 CAL CK 0090

Hon'ble Judges : Tapan Kumar Dutt, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : D.K. Ghosh and Mr. R. DeMr. Harish Tandon, Mr. Goutam Das and Mr. Prashant Agarwal, for the Appellant;

Judgement

Tapan Kumar Dutt, J.—The respondent in this appeal filed a suit being Money Suit No. 293 of 1989 in the City Civil Court at Calcutta against the appellants (defendants in the suit) praying inter alia for a decree for recovery of Rs.61,165/- and interest at the rate of 18% on the said sum.

2. The case of the respondent was to the effect that the respondent was appointed as a Works Manager by the appellant No.1 by virtue of a letter of appointment dated 17th February, 1987 for the Calcutta factory on certain terms and conditions. The initial probationary period was six months and it was stipulated in the letter of appointment that after the completion of such probationary period the service of the respondent will be confirmed if the respondent's performance was found satisfactory, otherwise, the probationary period will be automatically extended for another six months or the employment may stand automatically terminated. The further case of the respondent was that on 16th June, 1988 the respondent received a letter dated 15th June, 1988 issued by the defendant/appellant No.2 whereby the respondent's appointment was sought to be determined with immediate effect and the respondent was asked to collect his dues from the office of the appellants.

3. The plaintiff/respondent's case is that the plaintiff/respondent was not paid

his salary and other benefits from 1st June, 1987 onwards inspite of repeated demands having been made in this regard by the plaintiff/ respondent. The plaintiff has alleged that he has served a notice dated 28th June, 1988 upon the defendants/appellants demanding a certain sum of money but no reply was given to such notice. The plaintiff has made the claim in the suit on account of arrear salary, bonus, pay in lieu of two months' notice and one month leave salary in lieu of unavailed leave. The plaintiff has further stated in his plaint that the statement made by the defendants in the letter of termination to the effect that the plaintiff/respondent did not attend duties since a day before the labour agitation is false and it is the plaintiff/respondent's case that the plaintiff had at material times acted according to the instructions of the defendants/ appellants.

4. The defendants/appellants contested the said suit by filing a written statement denying the material allegations made in the plaint and have further alleged that the plaintiff/respondent neither rendered any service nor earned any remuneration in respect of the period of the claim and the plaintiff/ respondent served the defendants only for about three months i.e. upto 03.07.1987 when the defendant No.1-company had to declare a lock-out and the plaintiff/respondent absented himself from his work from 04.07.1987. The defendants/appellants have further alleged that the plaintiff/respondent was instructed to attend the City Office of the defendant No.1-company but he defied such instruction and left employment of his own accord. According to the defendants, the defendants waited for a long period of time and ultimately by a letter dated 13.04.1988 the defendants asked the plaintiff to meet the Director of the defendant No.1 but the plaintiff/respondent never turned up and ultimately by a letter dated 15.06.1988 the plaintiff/respondent's "appointment on 17.02.1987 as probationer was determined with immediate effect" and such determination of service was a matter of technical formality as the plaintiff/respondent had relinquished his job on 03.07.1987. The specific case of the defendants/appellants is that the respondent had left the employment on 03.07.1987 and that such allegation is supported by the relevant filled-in Provident Fund Form. According to the defendants/appellants, the plaintiff was paid his salary for the month of May, 1987 and the salary from 01.06.1987 to 03.07.1987 was tendered to the plaintiff but the plaintiff did not turn up to collect the same and nothing became due to the plaintiff thereafter i.e. from 04.07.1987 as he voluntarily abandoned the job and never cared to attend his allotted job in the City Office. The case of the defendants/appellants is that the plaintiff/respondent did not obey the instructions of the defendants/appellants to attend the City Office immediately after declaration of the lock-out.

5. The suit came up for hearing and the learned trial Court by judgment and decree dated 31.03.1993 decreed the said suit in part on contest by granting a decree for Rs.48,750/- in favour of the plaintiff/respondent which was directed to be paid by the defendants/appellants within two months and in default of such payment within the stipulated time the said amount will carry an interest of 10% w.e.f. 01.04.1993 till the date of payment. The learned trial Court was of the

view that the allegation of the defendants that there is nothing on record to show that the plaintiff attended the City Office cannot be accepted in as much as there is nothing to show on record that the plaintiff did not attend the City Office. The learned trial Court came to the conclusion that no attendance register was being maintained for the Works Manager in the City Office and as such there was hardly any scope to record the plaintiff's attendance in the City Office. The learned trial Court further held on perusal of the letter of termination that the plaintiff was in employment till 15th June, 1988 and he is entitled to get his pay for the period during which he was in service even though his service might not have been confirmed.

6. The only argument that was advanced by the learned counsel for the appellants was that the respondent had worked only upto 03.07.1987 and ever since the appellants declared lock-out with effect from 04.07.1987, the respondent did not do any work from the said date and the said respondent absented himself from 04.07.1987 and as such the respondent is not entitled to any salary and/or any remuneration for any period after 03.07.1987.

7. The said learned counsel contended that since the respondent did not perform any work after 03.07.1987 upto the date of termination of his service i.e. 15.06.1988, the respondent is not entitled to any salary and/or remuneration for such period. In support of such contention, the said learned counsel relied upon the decisions reported at Bank of India Vs. T.S. Kelawala and Others, under it) and Algemene Bank Nederland Vs. Central Government Labour Court and Others, . To buttress such contention the said learned counsel has relied heavily on a Form of Employees' Provident Fund Scheme, 1952 being Ext. 16 on records. According to the said learned counsel, the said Ext. 16 forms the sheet anchor of the appellants' case. We shall deal with the said Ext.16 in due course but before that we feel it will be wise to refer to the other Exhibits and the material pleadings on record.

8. There is no dispute with regard to the fact that the plaintiff was appointed as a works manager at the Calcutta factory of the appellants by a letter of appointment dated 17th February, 1987 and that in the letter of appointment there is a clause in respect of the probationary period which is as quoted below:

"2. Probationary Period:

(a) Your appointment is on a probation for a period of six months, however terminable without notice and without assigning any reason whatsoever for doing so, during the period of probation.

(b) After completion of probation period your services will be confirmed if your work is found satisfactory, otherwise the period of probation will be automatically extended for another 6 months or your employment may stand automatically terminated as on that date. After confirmation, your employment may be terminated on two months' notice or pay in lieu thereof on either side without assigning any reason whatsoever therefor."

9. There is also no dispute with regard to the fact that with effect from 04.07.1987 the appellant No.1-company declared a lock-out and the respondent was directed to attend the City Office of the appellant. Such admitted facts will be borne out by paragraph 3 of the written statement. Of course, the appellants have also pleaded in their written statement that even though the respondent was directed to attend the City Office, he defied such instructions of the appellant No.1-company and left the employment out of his own accord and the appellant No.1-company, after waiting for a long period of time, wrote a letter dated 13.04.1988 asking the respondent to meet the appellant No.2 but the respondent did not comply with such letter and ultimately by a letter dated 15.06.1988 the respondent's appointment in the said company as a probationer was determined with immediate effect. According to the appellants, the respondent had really relinquished his job on 03.07.1987.

10. After having read the pleadings of the parties and after having perused the materials on record we are of the view that there is no dispute with regard to the fact that the said Company was under a lock- out from 04.07.1987 and the respondent was directed to attend the City Office from the said date even though the respondent was appointed as a works manager in respect of the Calcutta factory of the said Company. From the materials on record it will also appear that the appellants have failed to prove that any attendance register was maintained at the City Office for the purpose of recording the attendance of a person in the post of works manager. There is also no evidence on record to suggest that the respondent was assigned any particular type of work or any work to be performed at the City Office. There is also nothing on record to show that the appellants had at any material point of time complained of the alleged non-attendance on the part of the respondent at the City Office. Absence from duty has not been attributed to the respondent while he was discharging his duties as a works manager at the factory upto 03.07.1987 and, thus, there is no history of absence from work which may be attributed to the respondent. The case of the appellants was that the respondent absented from duty with effect from 04.07.1987 but the appellants have not been able to place on record any document and/or any other convincing evidence to support such case. On the other hand, we find from Ext. 2 that by a letter dated 28.09.1987 the respondent wrote to the appellants that in spite of repeated reminders, the respondent has not been paid salary from June, 1987 although he was very much in service. From Ext. 5 it appears that by another letter dated 01.01.1988 the respondent again wrote to the appellant No.2 that in spite of repeated reminder on diverse dates, the respondent was not being paid his salary even though he was very much in service as per terms and conditions of the employment. By another letter dated 19.02.1988 (Ext. 8) the respondent again had to write that in spite of several requests, salary from the month of June, 1987 was not being paid to the respondent. The respondent had put on record on the said letter that he had personally met the appellant No.2 several times in this regard and by a series of letters dated 25.07.1987, 17.08.1987, 22.08.1987, 07.09.1987, 16.09.1987,

28.09.1987, 03.10.1987 and 01.01.1988, the respondent had repeatedly requested the appellants to make payment of the respondent's salary but the appellants did not pay any heed to such letters.

11. Thus, it will appear from the documentary evidence on record that the respondent has been very much in service and was going on writing letter after letter to the appellants for payment of his salary since he was very much in service of the appellants but the appellants did not for once contradict the fact, at the material time, that he was in service of the appellants. It was only after the respondent had written several letters upto 19.02.1988 did the appellant No.2 feel inclined to write a single-line letter dated 13th April, 1988 to the respondent asking the latter to see the former at the earliest. Even in the said letter dated 13th April, 1988 the appellants did not venture to allege that the respondent was not attending his place of work or not performing any work. After about two months from such letter and after about a year from the date of declaration of lock-out in the said company, the appellants for the first time, in June, 1988, came up with the allegation that since the day before the labour agitation the respondent did not attend his duties, and such allegation was made in the letter of termination dated 15th June, 1988. The records of the case clearly show that such allegation on the part of the appellants was just an after-thought. We have perused Ext.16 i.e. the Form in respect of the aforesaid Employees' Provident Fund Scheme and we have found that the said form has been interpolated at more than one place and such interpolations are quite stark. The overwriting appearing on the date of leaving service, as would be evident from the said Exhibit, is a disturbing feature which we cannot ignore. The learned counsel for the appellants has heavily relied on the said Exhibit for the purpose of showing the date when the petitioner allegedly left service but such date, as we have already observed, is starkly interpolated. Such document (Ext.16) cannot be relied upon and instead of supporting the case of the appellants it only portrays the appellants in a bad light. The plaintiff/respondent has stated in his evidence that he had signed the said form (Ext. 16) when it was blank and the entire form was filled in by an employee of the appellant No.1 and the said form was handed over to the respondent by the appellant No.1 for onward transmission to the competent authority. The respondent has further stated in his evidence that since the said form was not correctly filled up and the date of leaving service was not properly written he did not submit the same before the authority concerned and he also did not get any amount on that account. The respondent has also stated in his evidence that he attended the City Office regularly. Such piece of evidence on the part of the respondent remained unshaken.

12. The learned counsel on behalf of the appellants tried to draw inspiration from that part of the evidence where the respondent has stated in his cross-examination that he orally informed the management that he had no work in the City Office and that he has nothing to show by way of a document that he actually attended the City Office after the lock-out. Such statement on the part of

the respondent in evidence cannot be of any assistance to the appellants since in the absence of maintenance of any attendance register in respect of a works manager at the City Office, it cannot be expected that the plaintiff/ respondent should prove his attendance at the City Office. There is no dispute that no attendance register was being maintained at the material time in respect of works manager at the City Office. Duty was cast upon the appellants to show from any other materials on record by adducing proper evidence that the respondent had absented himself from attending the City Office. Since admittedly the respondent was a works manager at the factory it can be normally presumed that he was not supposed to have his usual work at the City Office unless the appellants could have shown by adducing proper evidence that the respondent was assigned certain particular kinds of work. The appellants have not adduced any evidence to show that the respondent was assigned any type of work at the City Office. In such circumstances, even if the respondent had not performed any work as such at the City Office, it could not have been for the fault of the respondent. The only conclusion would be that the appellants had failed to provide any work to the respondent. Thus the facts of the case would clearly reveal that the respondent had attended the City Office at the material points of time i.e. since 04.07.1987 upto the date of termination of service and even if the respondent did not perform any work it was because he could not have performed any work at the City Office and it was definitely not for any fault of the respondent but because of the inability on the part of the appellants to provide any work to the respondent at the City Office.

13. It is true that in Bank of India's case (supra), the Hon"ble Supreme Court has been pleased to observe at paragraph 23 (as referred to by the learned counsel for the appellants) of the said reports that it is not enough that the employees attend the place of work but they must put in the work allotted to them and that it is for the work and not for their mere attendance that the wages/salaries are paid. The said reported case cannot be of any assistance to the appellants since we have already held that even if the respondent could not perform any work at the City Office such non-performance of any work, if any, was owing to the inability on the part of the appellants to allot any work to the respondent.

14. The said learned counsel referred to paragraph 12 of *Algemene Bank Nederland, N. V.*'s case (supra) in support of his contention that wages and/or salaries are paid for the services rendered. In paragraph 12 of the said reports the Hon"ble Court was pleased to observe as follows:-

"12. I am of the opinion that the wages, as in the words of Lord Denning, are the payment for services rendered. I am inclined to think that it is not so much a question of whether the contract is divisible or entire but of reciprocal promises as the consideration, that is to say, the employer provides the employment and prays the remuneration and the employee performs the work during the period he is supposed to do the work. Therefore, the right of the employee to get the

remuneration depends upon the performance of his work during the period of employment. If there is any failure of that consideration then taking a strict view of the matter the employer is entitled to refuse any payment at all."

15. The said reported case also cannot come in aid of the appellants since it is the duty of the employer to provide work to the employee and unless such work is provided by the employer, employee cannot be faulted for not performing any work. Unless the employer allots a certain work to the employee it cannot be said that the employee "is supposed to do the work".

16. In view of the discussions made above, we are not inclined to interfere with the impugned judgment and decree passed by the learned trial Court since we are of the view that the present appeal has no merit and is liable to be dismissed. The appeal is, accordingly, dismissed. It appears that the learned trial Court has directed in its judgment and decree that in the event the appellants failed to pay the decreed amount within a stipulated time it shall carry an interest of 10%. It is, however, made clear that "interest of 10%" as mentioned in the impugned judgment and decree would be deemed to be and should be read as "interest of 10% p.a.".

17. There shall, however, be no order as to costs.

Urgent Xerox certified copy of this judgment, if applied for, be supplied to the parties upon compliance of requisite formalities.

Bhaskar Bhattacharya, J.

18. I agree.