
(1986) 01 AHC CK 0067
In the Allahabad High Court
Case No : Second Appeal No. 2461 of 1984

New India Assurance Company Limited and Others	APPELLANT
Vs	
Ashwini Kumar Srivastava	RESPONDENT

Date of Decision : 24-01-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 100(1)

Citation : (1986) 01 AHC CK 0067

Hon'ble Judges : A.N. Dikshita, J

Bench : Single Bench

Advocate : Vineet Saran, for the Appellant; S.D. Dwivedi, Radhey Shyam, Ram Nath and S.B. Varma, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Dikshita, J.—This second appeal has been preferred by the Defendants against the judgment and order dated 31.7.1984 passed by the 1st Additional District Judge, Allahabad.

2. The relevant facts as emerge from the record are: The Plaintiff-Respondent filed a suit in the court of Munsif (West) Allahabad, for a declaration that in view of the withdrawal of his resignation a decree for declaration be passed in his favour that he still continues in the service of the New India Assurance Company Ltd., and also for a declaration that the Plaintiff was entitled to all his pay and other benefits.

3. The defendant-Appellants contested the suit denying the allegations of the Plaintiff. After the trial the suit was dismissed by the 7th Additional Munsif, Allahabad, vide his judgment and order dated 1.5.1981. An appeal was then preferred to the court of the District Judge, Allahabad, and the 1st Additional District Judge, Allahabad, by his judgment and order dated 31.7.1984 set aside the judgment and order passed by the 7th Additional Munsif, Allahabad, dismissing the suit and declared that the Plaintiff still continues to be in the

service of New India Assurance Company Ltd., and was entitled to attend the office, discharge his duties and draw his pay and allowances as admissible from time to time thus giving rise to the instant appeal.

4. The second appeal was admitted by this Court on the following questions of law which were formulated:

1. Whether the lower appellate court has gone wrong in treating the suit within limitation as it was clearly beyond time on the date of the institution ?

2. Whether the suit of the Plaintiff was barred under Order 2 Rule 2 Code of Civil Procedure?

3. Whether in a declaratory suit only, was it open to the lower appellate court to grant a decree passed by it?

5. Counsel for the parties have been heard.

6. Admittedly the suit was filed on 4.10.1978 in the court of Munsif (West) Allahabad. Learned Counsel for the Appellants submitted that the suit was filed beyond time and was not maintainable and the court had no jurisdiction to entertain it. The trial court was impressed by this plea on behalf of the Defendants-Appellants and held that the suit was beyond the period of limitation and as such was not maintainable. The lower appellate court found the decision of the trial court as regards the question of limitation as patently erroneous. The lower appellate court found that no specific date could be assigned for the cause of action and as the Plaintiff had withdrawn his resignation to be effective with effect from 1.6.1973 and was prevented by the Appellants from discharging his duties in an arbitrary manner the cause of action would accrue to the Plaintiff on each day. The resignation with effect from 1.6.1973 was prospective and much prior to 1.6.1973 it was withdrawn on 18.5.1973 and 24.5.1973. The Supreme Court in *Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others*, held that an incumbent had a right to withdraw the resignation before it came into effect. Such a controversy also arose in *State of Himachal Pradesh v. Jai Dev Ram* 1984 LIC 1492 and it was held that the suit for declaration would not be hit by the period of limitation as the act of the Appellants was illegal and invalid in preventing the Plaintiff from discharging his duties. It is well settled that such a suit for declaration would be maintainable and cannot be thrown on the ground of limitation.

7. In *State of Madhya Pradesh v. Syed Qamar Ali* 197 SLR 228 the suit for recovery of arrears of pay was tiled after a lapse of seven years of the order of dismissal. The Supreme Court took the view that since the order of dismissal was passed in breach of the mandatory provisions of the rules and the order was invalid the suit was not barred by limitation. Such a view also finds support from the decisions in *Sakal Deep Sahai Srivastava Vs. Union of India (UOI)* and *Another*, and *Jai Chand Sawhney Vs. Union of India (UOI)*, .

8. As discussed above in view of the resignation letter having been withdrawn it

ceased to be in existence on 1.6.1973. Applying the law laid down in *Union of India v. Gopal Chandra Misra* AIR 1978 SC 94 (supra), the Appellants had unlawfully prevented the Plaintiff-Respondent from rendering service. Thus the cause of action to maintain the suit would accrue to the Plaintiff on each and every day he was unlawfully prevented. The lower appellate court was right in holding that the suit was maintainable and was not hit by the bar of the Limitation Act.

9. Counsel for the Appellants then urged that the suit was barred under the provisions of Order 2 Rule 2 Code of Civil Procedure. A bare perusal of this provision would indicate that there is no merit in this submission. The Plaintiff-Respondent has filed the suit for a declaration that in view of the resignation letter having been withdrawn it is declared that he was still in service of Defendant No. 1 and was entitled to all the emoluments from the Defendants. The Plaintiff had also claimed a decree for the emoluments which had been revised from time to time as found admissible to him by the court from the date of declaration. Rule 2 of Order 2 of the Code provides that every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action. It further permits the Plaintiff to relinquish any portion of his claim so as to bring the suit within the jurisdiction of the court. The Plaintiff had claimed a decree that it be declared that he still continues to be in service and was entitled to all the emoluments, The suit for declaration has been decreed by the lower appellate court. It has been clearly held that the Plaintiff is entitled to attend the office, discharge his duties and draw his pay and allowances as admissible from time to time. The suit of the Plaintiff was thus not barred under the provisions of Order 2 Rule 2 Code of Civil Procedure.

10. Learned Counsel for the Appellants then very sub deadly urged that the lower appellate court has granted a decree to the Plaintiff-Respondent for such benefits when it was not to it in a suit for declaration. It was canvassed that the lower appellate court erred in law in decreeing the suit as regards the pay allowances admissible to the Plaintiff. It had been found that the Appellants had unlawfully prevented the Plaintiff from rendering service. If the contention of the learned Counsel for the Appellants is accepted that the Plaintiff was entitled to his arrears of salary only for a period of three years from the date of the declaration it will cause gross and substantial injustice to the Plaintiff. In *Maimoona Khatun and Another Vs. State of Uttar Pradesh and Another*, the Supreme Court held:

It seems to us that if we take the view that the right to sue for the arrears of salary accrues from the date when the salary would have been payable but for the order of dismissal and not from the date when the order of dismissal is set aside by the civil court, it will cause gross and substantial injustice to the employee concerned who having been found by a court of law to have been wrongly dismissed and who in the eye of law would have been deemed to be in service would still be deprived for no fault of his of the arrears of salary beyond

three years of the suit which, in spite of his best efforts he could not have claimed, until the order of dismissal was declared to be void. Such a course would in fact place the Government employee in a strange predicament and give an under serving benefit to the employer who by wrongfully dismissing the employees would be left only with the responsibility of paying them for a period of three years prior to the suit and swallow the entire arrears beyond this period without any legal or moral justification.

11. Apart from the above in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, the Supreme Court laid down the scope of interference in second appeal by the High Court. It has been stated that if the High Court is satisfied that the decision is contrary to law or some usage having the force of law, or that the decision has failed to determine some material issue of law or usage having the force of law, or if there is substantial error or defect in the procedure provided by the Code, or by any other law for the time being in force which may have produced error or defect in the decision of the case upon the merits, it can interfere with the conclusions of the lower appellate court. The Supreme Court further clarified that the error or defect in the procedure to which Clause (c) of Section 100(1) CPC refers is, as the clause clearly and unambiguously indicates, an error or defect connected with or relating to the procedure; it is not an error or defect in the appreciation of evidence adduced by the parties on the merits.

12. In the instant second appeal I do not find the decision of the lower appellate court contrary to law nor it omits to consider any material issue of law or usage having the force of law. There is no substantial error or defect in the procedure adopted by the appellate court. The judgment and decree of the lower appellate court, therefore, cannot be interfered with.

13. As a result of the above discussion, this second appeal fails and is hereby dismissed with costs.