
(1995) 05 DEL CK 0004

In the Delhi High Court

Case No : Regular Second Appeal No. 13 and 14 of 1991

N.G. Pandey

APPELLANT

Vs

Unitech Ltd.

RESPONDENT

Date of Decision : 02-05-1995

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1995) 3 AD 137 : (1995) 59 DLT 22

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : O.N. Vohra, Ajay Laroia and S.M. Chugh, for the Appellant;

Judgement

C.M. Nayar, J.

(1) The present judgment will dispose of two appeals, Rsa 13/91 and Rsa 14/91. The same have arisen from the judgment of Senior Sub-Judge, Delhi dated 28th January, 1991. The Learned Judge accepted the appeal of respondent-defendant and dismissed the appeal of the appellant-plaintiff which had been filed against the judgment of Sub-Judge, First Class, Delhi in Suit No. 118/88. The brief facts of the case are that the appellant was employed with the respondent-company for the post of Senior Supervisor on 25th June, 1984 at a basic salary of Rs. 1100.00 p.m. The appellant worked at various places in India such as Jabalpur, Dadri, Chandipur, Vishakhapatnam etc. He was drawing a basic salary of Rs. 1220 .00 which worked out to total amount of Rs. 2003.00 p.m. Certain differences arose between the appellant and the respondent-Company issued show cause notice and a chargesheet in this regard on 1st April, 1988. The services of the appellant were terminated with effect from 12th April, 1988. The appellant- plaintiff impugned the order of termination as illegal, unjustified, malafide and without consideration. The appellant sought a decree of mandatory injunction and for direction to the respondent to re-instate him with all benefits and salary with revised pay scale and also for a restraint order from dispossessing him from the premises where the appellant was staying except

with due process of law. The respondent-defendant filed written statement where certain preliminary objections were raised and the main objection was relating to the territorial jurisdiction of Delhi Court to adjudicate as the suit property where the appellant was staying was situated at Faridabad. The Trial Court framed the following preliminary issue:-

"WHETHER the suit in the light of Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, is maintainable."

(2) The Court after hearing the parties held that the suit was not maintainable as the appellant was not a public servant and there was no contravention of the provisions of Article 311 of the Constitution of India. The learned Judge based his reasoning on the basis of law as laid down in the judgment of Supreme Court in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, . The findings are given in paragraph 5 of the judgment which reads as follows:-

"I have thoroughly and carefully gone through this judgment. It has been laid down by their Lordships H.R. Khanna, S. Murtaza Fazal Ali, that the contract of personal services cannot ordinarily be specifically enforced and the Court normally could not 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 exception:

(I)where a 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 re-instated 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.

If the case of the plaintiff is viewed in the light of the above law laid down by the Hon"ble Supreme Court, it comes out crystal clear that the case of the plaintiff does not fall in any of the three exceptions mentioned above. The plaintiff is not a public servant, hence there is no contravention of the provisions of Article 311 of the Constitution of India. Secondly, the plaintiff also does not fall within the definition of worker who can be re-instated on being dismissed under the Industrial Law because the plaintiff is not a workman but a Senior Supervisor. Thirdly, the case of the plaintiff does not fall within the third exception because the defendant-Company is not a statutory body.

(3) It was accordingly held that the suit was not maintainable. The learned Judge, however, granted relief to the appellant in the form of solarium and compensation. Paragraph 9 of the judgment makes an interesting reading and is reproduced as follows:

"NO doubt the suit of the plaintiff is going to be dismissed as being not maintainable yet, I would like to record here that the plaintiff is losing his case purely on law point and not on facts. The facts have not been touched at all since that stage has not been allowed to be reached by the above discussed law laid down by the Hon"ble Supreme Court of India. I have gone through the facts of the case and thus I am conversant with the factual position of the case. At this stage, without giving my mind on factual position of the case, I will not hesitate to record that had the case been allowed to proceed, it would have been certain that the plaintiff did not approach the Court with the lifeless and hopeless case. However, nothing can be done in the wake of the above referred law of the Hon"ble Supreme Court. All the same, the said law laid down by the Hon"ble Supreme Court of India does not prevent me from exercising my inherent powers in granting some relief to the plaintiff by way of solarium, although not compensation."

(4) On the above basis, the Court granted the relief to the appellant by paying 50 per cent of the total emoluments per month being drawn by him at the time of filing of the suit till the date of decision and this amount was directed to be disbursed to him as solarium. The appellant as well as the respondent-Company both felt aggrieved by the order of the Trial Court and filed their respective appeals before the Court of Senior Sub-Judge, Delhi. The Learned Judge allowed the appeal of the respondent and dismissed the appeal of the appellant and consequently dismissed the suit. He came to the finding that the relief of solarium granted to the appellant was obviously beyond pleadings as the suit was held to be non-maintainable as the relief could not be granted. The appellant felt aggrieved by the order of the Trial Court as well as by the First Appellate Court and filed the present two appeals. These appeals were admitted and the following substantial questions of law were framed for consideration:-

1. Whether in the absence of a plea in the written statement with regard to the maintainability of the suit, a preliminary issue can be framed on this by the Court.
2. Whether such preliminary issue can be decided without affording opportunity of leading evidence to the parties in the facts of the case.
3. Whether the Court while holding that the suit was not maintainable, could grant the relief of solarium to the plaintiff.

I have heard learned Counsel for the parties for the appellant as well as for the respondent. The main contention of Mr. Vohra who appears for the appellant is that the Trial Court should have disposed of the matter by following the relevant provisions of law as contained in the CPC by permitting the parties to adduce evidence and then to give findings in respect of issues arising in the case.

(5) Mr S.M. Chugh, who appears for the respondent-Company has argued that the Trial Court was within its powers to frame the preliminary issue and dispose of the suit on that basis. In any case, he contends, that the suit was not maintainable on present facts. Had the appellant been held to be a workman, an

appropriate remedy is provided under Industrial Disputes, Act and the appellant was at liberty to pursue that remedy under that legislation. In case the appellant was not a workman and was held to be an officer of the Company, the appropriate remedy was for the claim of damages. In this situation, it is stated that the Trial Judge was perfectly within his powers to frame the preliminary issue and dispose of the matter without recording of evidence and without proceeding on the basis of a regular trial. The learned Counsel has, however, reiterated that the judgment of the Trial Court in respect of the award of solarium was not in any manner maintainable and the Court fell in error by misinterpreting and misapplying the judgment of the Supreme Court as reported in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, . The First Appellate Court quite correctly dismissed the appeal preferred by the appellant by holding that the suit was not maintainable and by allowing the appeal of the respondent by returning a finding that the relief of solarium granted to him was beyond the pleadings.

(6) The Trial Court is not debarred from framing a preliminary issue to determine whether the suit was maintainable although no such plea was taken in the written statement. This issue, however, should have been disposed of on the basis of pleadings of the parties and by following the rules of evidence, oral as well as documentary and by granting an opportunity in this regard. The Court did not proceed to deal with the matter in this manner and disposed of the suit on facts without establishing any nexus with the pleadings on record. The main consideration which was adopted was on the basis of law as laid down by the Supreme Court in the case of Executive Committee of Vaish Degree College and Others (Supra). The facts of that case would indicate that the appellant therein which was the Executive Committee of Vaish Degree College in the District of Muzaffar Nagar was registered under the registration of Cooperative Societies Act as an institution for imparting education. The affairs of the college were managed by the Executive Committee of the college which was the appellant in that case. The respondent was appointed as Principal of the College on permanent basis with effect from 1st July, 1964 and his appointment as Principal was formally approved by the Vice Chancellor of the Agra University. Two years later, it appeared that differences arose between the Executive Committee of the College and the respondent resulting in allegations and counter allegations and culminating in a notice served by Executive Committee on October 24 1966. This was followed by the counter notice etc. and on 12th March, 1967, the Executive Committee, by a resolution terminated the services of the respondent-plaintiff with effect from 24th October, 1966 and the civil proceedings were commenced by the respondent as a result of that termination. The Trial Court framed a number of issues and after considering the evidence and the circumstances on record, held that a case for declaration or injunction had not been made out and accordingly dismissed the suit of the respondent-plaintiff. The appeal filed was disposed of by the Additional Civil and Sessions Judge, Muzaffar Nagar who reversed the decision of Munsif and decreed the suit and granted the injunction

prayed for. The judgment of the First Appellate Court was impugned in second appeal in the High Court. The matter was referred by a Single Judge to Full Bench and certain relevant issues were framed as questions of law. It was disposed of by the Single Judge by holding that the respondent was entitled to the injunction as prayed for. In this situation, SLP was filed in the Supreme Court. Reference is made to the findings as recorded in para 17 of the judgment by the learned Counsel for the respondent and similar reference was made by learned Trial Judge in his order. It is argued that no relief on the basis of this judgment could be granted to the appellant in the present case as well. The said paragraph reads as follows:-

"ON a consideration of the authorities mentioned above, it is, Therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not 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 recognized exceptions, (i) where a 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."

(7) The Supreme Court accordingly allowed the appeal of the College and set aside the order of the High Court as well as of Additional Civil Sessions Judge and dismissed the suit of the respondent-plaintiff. It is not in dispute that the judgment was rendered by the Trial Court of Munsif on the basis of pleadings and issues as framed as well as consideration of evidence on record. It is so stated also in the judgment of the Supreme Court that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration in that regard. There may not be any dispute with this proposition though the law has obviously undergone some change since the judgment was rendered in the year 1976 and the right of an employee is protected by law laid down in subsequent judgments which require such issues to be disposed of on merits after following the principles of natural justice as well as by recording of evidence which may be relevant to the issues raised by the parties. In this context, the judgment in Vaish Degree College also does not lay down an absolute bar that the suit of present nature is not maintainable at any cost and it is not necessary for the Trial Court to adjudicate on the questions raised therein by appropriate evidence which may be required to be considered by the Civil Court. It is reiterated by the same judgment that the Civil Court is vested with the discretion to consider whether the same should be exercised in favor of the appellant and that will depend on the facts and circumstances of each case. Reference may be made to paragraph 26 of the judgment which reads as follows:-

"IT seems to us that neither the First Additional Civil & Sessions Judge nor the

High Court, while decreeing the plaintiff's suit, considered this aspect of the matter whether this was a fit case in which the discretion should have been exercised in favor of the respondent. It is manifestly clear from the authorities discussed above that 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."

Similar view has been expressed by Bhagwati. J. in paragraph 34 which reads as follows:-

"THE first respondent on this view, would ordinarily be entitled to the declaration and injunction prayed for by him, but the relief of declaration and injunction being discretionary, I agree with the view taken in the judgment of my learned Brother Fazi Ali, J. that having regard to the peculiar facts and circumstances of the present case as set out in his judgment, this is not a proper case where such relief of declaration or injunction should be granted to the first respondent; instead the aggregate amount of Rupees 21,100.00 deposited by the appellant in the Court would be fair and just compensation to the first respondent. However, I must hasten to make it clear that ordinarily an employee whose termination of service is found to be null and void or ineffective by reason of a statutory provision, and that would include subordinate legislation which has the force of law, should be awarded a declaration that he continues in service and it should be no ground for refusing him such declaration that before his purported termination of service, he was in employment only for a short period. That would be denying him security of tenure which the law seeks to give him in clear and unambiguous terms. But, in the present case, the circumstance which weighs most with me in refusing to exercise my discretion in favor of the first respondent is that if the relief of declaration and injunction is granted to the first respondent it will involve the appellant in financial liability of over Rupees one lakh and that would wipe out the educational institution of the appellant or in any event, seriously cripple it and that, in its turn, would prejudicially affect the interests of the student community which is an important consideration which the Court cannot fail to take into account while determining what are the broad considerations of social justice which must guide its exercise of discretion."

(8) The perusal of the judgment which has been the subject-matter of interpretation by the Trial Court clearly indicates that the Civil Court is vested with powers to consider the matter with regard to the relief of declaration and injunction. On the exercise of discretion in case of an employee who has impugned his termination of service on the ground that the enquiry conducted

against him is null and void and he be declared to be in service, the discretion by this Court has to be exercised in the facts and circumstances of each case to administer justice between the parties and not to convert itself into an instrument of injustice or an engine of oppression. The Trial Court in the present case has framed the preliminary issue on its own volition and has proceeded to dispose of the matter in a summary manner without recording any evidence and without following the usual procedure to be adopted in such a case. This was not even the method followed by the Trial Court in the case of Vaish College where evidence was recorded and the issues were disposed of on that basis. The other judgment, as referred to in the preliminary issue i.e. Perundevi Ammal Vs. Amavasikan and Others, , is admittedly not applicable to the facts of the present case as it relates to a matrimonial matter under the Hindu law. This approach clearly speaks of non-application of mind by the Trial Court in disposing of the suit on the basis of preliminary issue on nonexisting grounds and then to award solarium in favor of the appellant and against the respondent which also cannot be justified without appropriate procedure being followed as provided by law. The First Appellate Court quite correctly accepted the appeal which was filed by the respondent to impugn the award of solarium but that Court also fell into error by upholding the first part of the judgment of the Trial Court with regard to the disposal of the matter on the basis of preliminary issue. The matter should have been remanded to the Trial Court for disposal of the same in accordance with law after framing the relevant issues arising from the suit and by permitting the parties to lead evidence. The question whether the appellant was a "workman" or a supervisor/officer of the respondent-Company, was not at all dealt with. The substantial questions of law as framed by this Court will have to be answered in the following manner:

(1)The suit could not be held to be not maintainable in the absence of a plea in the written statement as well as on the facts and circumstances of the present case. This question accordingly has to be answered in favor of the appellant.

(2)The Trial Court as well as the First Appellate Court erred in deciding the preliminary issue without affording opportunity of leading evidence to the parties in the facts of the case and for the reasons as recorded above. This question is also determined in favor of the plaintiff/appellant.

(3)The Trial Court was not within its powers to grant solarium to the appellant/plaintiff and the same was correctly set aside by the First Appellate Court.

(9) For the aforesaid reasons, the present appeal is allowed. The matter is remanded back to the Trial Court for disposal of the suit in accordance with law by permitting the parties to lead their respective evidence. The other connected Appeal Rsa 14/91 is also disposed of in the above terms. The parties are directed to appear in the Trial Court on 17th July, 1995. The appellant shall also be entitled to costs of these appeals which are quantified at Rs. 5,000.00.