

(2014) 08 AHC CK 0079
In the Allahabad High Court
Case No : Second Appeal No. 1245 of 1992

Union of India

APPELLANT

Vs

Chandra Swaroop Srivastav

RESPONDENT

Date of Decision : 06-08-2014

Acts Referred:

Administrative Tribunals Act, 1985 — Section 29(1)
Civil Procedure Code, 1908 (CPC) — Section 80, 96
Constitution of India, 1950 — Article 136, 311

Citation : (2014) 10 ADJ 493

Hon'ble Judges : Sunita Agarwal, J

Bench : Single Bench

Advocate : S.K. Misra, C.S.C., Rakesh Mohan, Shambhu Chopra and S.K. Srivastava, Advocate for the Appellant; Krishna Mohan, S.K. Mishra, K.M. Dayal and R.K. Khanna, Advocate for the Respondent

Judgement

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Sunita Agarwal, J.—This is defendant's appeal against the judgment and decree dated 15.5.1992 in Civil Appeal No. 67 of 1985 arising out of Original Suit No. 721 of 1982 (Chandra Swaroop Srivastava v. Union of India and others).

The plaintiff respondent instituted Original Suit No. 721 of 1982 for declaration that he became a regular employee of the defendant department and further relief sought was for reinstatement and payment of back wages. The plaintiff's case was that the plaintiff was appointed on the post of Labour on 3.5.1977 for a period of six months in the defendant department. Before the probation period expired on 2.5.1978 by the order dated 1.5.1978 it was extended for a period of six months i.e. 1.11.1978. However, on 23.9.1978 the petitioner was terminated from services during the extended period of probation.

The plaintiff contended that the termination order is illegal and is against the provisions of Article 311 of the Constitution of India. The suit was instituted after giving notice under Section 80 C.P.C. The defendant contested the suit and

accepted the fact of appointment and extension of probation period for six months by order dated 1.5.1978. However, it was contended that as work of the petitioner was not satisfactory so the period of six months was extended in order to give him an opportunity to improve his working. During the period of probation, it was found that the petitioner has failed to show any improvement and as such by the order dated 23.9.1978, his services were terminated in accordance with law. The petitioner is not entitled for any salary after 23.9.1978. The termination order does not suffer from any illegality and requires no interference. The trial Court on the basis of pleadings framed various issues. Relevant issues framed are given as under:

1. Whether the plaintiffs services were illegally terminated?
4. Whether the plaintiff is entitled to any payment of back wages?
6. Whether the plaintiff is temporary regular worker? If yes, its effect?

Issue No. 1, 4 and 6, were taken up together and decided by the trial Court against the plaintiff. It was held that services of plaintiff were terminated during the period of probation and he was not permanent employee as alleged by him. Since services were terminated in accordance with the legal provision, he is not entitled for any salary. The suit was dismissed by the judgment and order dated 31.10.1984.

2. Aggrieved, the plaintiff went up in appeal and initially First Appeal was filed before this Court. The appeal was transferred by the High Court to the District Judge on the ground of valuation. The lower appellate Court heard the appeal on merits and decreed the suit by judgment and order dated 15.5.1992 declaring the termination of the petitioner illegal and the decree was passed to reinstate him with all consequential benefits from the date of termination.

3. Present second appeal was admitted by the order dated 25.8.1992 and while admitting the appeal following substantial question of law was framed:

"Whether in view of specific condition in the appointment letter that the probation period would not ordinarily be extended beyond one year and in the face of an express order extending the probation period beyond one year which was passed before the expiry of one year there could be an inference of automatic confirmation?"

4. Heard Sri S.K. Mishra, learned counsel for the appellant and Sri Raj Kumar Khanna, learned counsel for the respondent.

5. At the outset, Sri S.K. Mishra, learned counsel for the defendant appellant submits that the present second appeal involves another substantial question of law which has been framed as question No. 6 in the memo of appeal and goes to the merits of the case. He submits that the suit was dismissed on 31.10.1984, and the First Appeal was filed before this Court but the same was transferred to the lower appellate Court in the year 1985. In the meantime, the Central

Administrative Tribunal was established on 1.11.1985. As the respondent establishment is Union of India, Section 29(1) of the Administrative Tribunal Act, 1985 would be applicable in so far as the case of plaintiff is concerned.

6. He further submits that in view of Section 29(1) of the Act every suit or proceeding pending before any Court or other authority immediately before the date of establishment of a Tribunal under the Administrative Tribunal Act is to be transferred to the Tribunal. He submits that after the Administrative Tribunal was established on 1.11.1985, the Civil Court had no jurisdiction to entertain the suit. The proceedings were pending before the appellate Court. The petitioner's suit being continued, the lower appellate Court was under obligation to transfer the same to the Tribunal. It had no jurisdiction to enter into merits of the appeal and pass decree dated 15.5.1992.

7. He submits that the substantial question of law No. 6 has been framed to this effect and the same be heard and decided as the first substantial question of law before deciding other substantial questions of law. Substantial question of law No. 6 framed in the memo of appeal is necessary to decide the controversy in the present case. Both the counsels for the parties placed their submission on the question No. 6 which is as follows:

"6) Whether the Lower Appellate Court had the jurisdiction to hear and decide the Appeal in view of Section 29(1) of the Administrative Tribunals Act, 1985?"

8. Refuting the submission of learned counsel for the appellant, Sri R.K. Khanna, learned counsel for the plaintiff respondent submits that proviso to Section 29(1) of the Administrative Tribunal Act, 1985 would not be applicable to the present case. In order to substantiate his arguments he submits that on the date of coming into operation of the Administrative Tribunal Act, the First Appeal i.e. appeal against the judgment and order passed by the Court of first instance dated 31.10.1984 was pending before the High Court and therefore, the provision as provided in proviso to Section 29(1) would not be applicable. He further submits that this Court itself remanded the matter back to the lower appellate Court and therefore there was no occasion for the lower appellate Court to transfer to the Administrative Tribunal under Section 29(1) of the Act.

9. The phrase "suit and other proceedings" pending before the Court would not include the appeal, as the appeal is neither a suit nor the case within the meaning of other proceedings. Further submission of learned counsel for the plaintiff respondent is that the pleading of jurisdiction was available to the appellant before the lower appellate Court but it was never raised and no issue was framed on the point. In absence of pleading and the issue, the defendant appellant cannot be permitted to raise the same in the present Second Appeal. The appellant is estopped from raising this question for the first time in the second appeal.

10. In rejoinder, Sri S.K. Mishra, learned counsel for the appellant submits that the jurisdiction of the Court is a pure legal issue which does not involve any

factual aspect. There cannot be any estoppel against the Statue. The appellant cannot be estopped from raising the same.

11. Having heard learned counsel for the parties and perused the record, first question which is to be answered by the Court is as to whether the appellant would be permitted to raise the plea of jurisdiction of the lower appellate Court for the first time in the present second appeal. As per the General Principle, parties are not allowed to raise new pleadings in the Second Appeal. However, when the new pleading raised is purely of legal nature, it is sometimes raised even in the second appeal.

12. This proposition finds support from the judgment of this Court in Chhedilal and another v. Rajaram (deceased) by legal representatives and another, 2008(1) ALJ 12. In Chhedilal (supra) the question raised was with regard to jurisdiction of lower appellate Court on the ground that civil suit directing Municipal Board to cancel licence was not maintainable as the U.P. Municipalities Act provides for complete mechanism for cancellation of licence and, therefore, Civil suit is impliedly barred. The plea was not taken before the Court below. However, this Court after consideration and perusal of judgments of Apex Court came to the conclusion in paragraph 21 which is quoted as under:

"Accordingly, the position of law that emerges is that a point of law may be taken at any time provided that for its decision no fresh finding of fact is necessary. In other words, if the facts are admitted or if the findings of the Court on facts are enough for the decision of the point of law raised, the Court of law is bound to hear the point of law so raised and if necessary give effect to it."

13. While coming to the conclusion that the defendant appellant is not barred from taking the plea of maintainability of the suit for the first time in the second appeal, this Court has relied upon judgment of the Apex Court in Ram Kristo Mandal and Another Vs. Dhankisto Mandal, , wherein it has been held that pure legal point apparent on the face of record which does not involve any further development by evidence may be taken in appeal even though it may not have been raised in the Court below. Further analogy has been drawn from the judgments of the Apex Court in Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, and Kesar Singh and Others Vs. Sadhu, , wherein it was held that if the decree passed by the Court lacks jurisdiction, it strikes at the very right of the authority to pass the order or the decree and thereby it is invalid. Its fault can be assailed at any stage including at the stage of execution or in the collateral proceedings since it strikes the very jurisdiction of the Court.

14. In Kesar Singh (supra) the Apex Court has further held that when the matter comes to the right or jurisdiction, it is settled law that it can be raised even in execution. Taking this analogy from the above judgments of Apex Court in Urban Improvement Trust (supra) and in Kesar Singh (supra), this Court in Chhedilal and another v. Rajaram (deceased) by LRs and another (supra) has observed in paragraph 25 and 26 as below:

"25. In view of the above settled legal position there is no second opinion that a legal plea which goes to the root of the jurisdiction of the Court and renders the decree a nullity can be taken at any stage of the proceedings including execution provided there is no dispute on facts which requires evidence. The said plea on the face of it does not involve any factual aspect or evidence to adjudicate the same. Therefore, the defendants-appellants are not barred from taking the above plea for the first time in the Second appeal."

"26. The plea that the jurisdiction of the Civil Court is impliedly barred in respect of cancellation of the licence granted by the Municipal Board is a plea which is purely legal in nature and no material is required to substantiate the same except for considering the various provisions of the law. The said plea involves the question of the jurisdiction of the Court. Therefore, in my opinion there is no harm in permitting the defendant-appellant to raise the same for the first time in second appeal."

15. Reference may also be made to judgment in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, . In paragraph 23 and 24 of the said judgment, the Apex Court took into account the legislative changes, in an appeal filed under Article 136 of the Constitution of India. It was noted that on the date of coming into operation of the Benami Transaction Act, the appeal was pending. Considering judgment of Apex Court in AIR 1941 5 (Federal Court), it was held that said judgment is an authority for holding that the hearing of appeal under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case of appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. The Apex Court also relied upon judgment in the case of *Amarjit Kaur Vs. Pritam Singh and Others*, , in support of above proposition. Para 23 and 24 of the judgment in *Mithlesh Kumari v. Prem Behari Khare*, are relevant for coming to the conclusion that pendency of appeal before the lower appellate Court amounts to continuance of proceedings in suit and therefore first appellate Court ought to have taken into account the legislative changes which took place during pendency of the said appeal.

16. In so far contention of learned counsel for the plaintiff respondent that words "suit or other proceedings" used in Section 29(1) of the Act would not include First Appeal under Section 96 of the C.P.C. and therefore the same would not come within the purview of the said section. Suffice is to say that the said contention is misconceived in view of the settled legal position that the appeal is continuation of the suit and is only rehearing. The appellate Court is bound to take into account the legislative changes which has taken place between the date of the decree and the decision of the appeal.

In view of above discussion, the substantial question of law No. 6 as framed in the memo of appeal is decided in favour of the defendant appellant.

17. Now coming to the question framed by this Court at the time of admission of

the appeal. The question is as to whether in view of specific conditions in the appointment letter when the probation period would not "ordinarily be extended beyond one year", whether there could be any inference of automatic confirmation in the face of an expressed order extending the probation period beyond one year which was passed before the expiry of one year.

18. To answer the said question it may be noted that the appointment letter itself makes it clear that the plaintiff was appointed on probation. The word "ordinarily" means that it would not be extended beyond period of one year in the ordinary course. However, in the given situation, the case of the employer defendant is that six months extension of probation period was granted to the plaintiff in order to give him an opportunity to improve his working. The plaintiff's services were terminated before the expiry of extended period of probation, as he failed to show any improvement.

19. It is settled law that after completion of extended period of probation, a specific order is to be passed by the employer regarding confirmation. There is no provision for automatic confirmation during the extended period of probation or at the end of the probation period in the service jurisprudence. The word "ordinarily" used in the appointment letter itself makes it clear that the period of probation would be one year. However, it could be extended by the employer. Thus the view taken by the lower appellate Court that the status of the plaintiff as a probationer changed after the initial probation period of one year came to an end and if his services were to be terminated, it could not have been done treating him as probationer, is erroneous. Termination order passed during the extended period of probation cannot be said to be illegal. There is no automatic confirmation after probation period of one year. The statement in the appointment letter that the probation period would not ordinarily be extended beyond one year would not confer any right of confirmation upon the plaintiff employee. Admittedly the probation period was extended for six months and his services were terminated during the extended period of probation period.

Second substantial question of law framed is, therefore, answered against the plaintiff respondent. The judgment and order dated 15.5.1992 passed by the lower appellate Court is therefore set aside being without jurisdiction and illegal.

Second appeal is, accordingly, allowed.