
(2010) 03 CAL CK 0042

In the Calcutta High Court

Case No : A.P.D. No. 217 of 2009, A.P.D.T. No. 9 of 2009, G.A. No. 2040 of 2009 and C.S. No. 69 of 2005

WPIL Limited and Others

APPELLANT

Vs

Asit Kumr Palit and Another

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Citation : (2010) 2 CALLT 101 : (2010) 125 FLR 979

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : S.N. Mukherjee, Ratnako Banerjee and T. Aich, for the Appellant; Jyanta Mitra, Arijit Banerjee, R.L. Mitra and Priyanka Dhar, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This first appeal is at the instance of the defendants in a suit for declaration and recovery of money and is directed against the judgment and decree dated June 26, 2009 passed by a learned Single Judge of this Court by which His Lordship passed a decree of Rs. 10,77,240/- and further, a declaration that the plaintiff/respondent has a right to receive, during his lifetime, the pension from the defendants under the superannuation scheme that was prevalent as on 24th June, 2002 @ Rs. 29,700/- a month with effect from July, 2002 with interest @ 12% per annum on the amount decreed.

2. Being dissatisfied, the defendants have come up with the present appeal.

3. The respondent before us filed against the appellants a suit out of which the present appeal arises thereby praying for the following relief:

a) Declaration that the plaintiff has a right to receive during his life time pension from the defendants under the latter's Superannuation Scheme that was prevailing as on 24th June, 2002 at the rate of Rs. 29,700/- per month with effect from July 2002;

- b) Decree for Rs. 10,77,640/- as pleaded in paragraph 36 of the plaint;
- c) Decree of mandatory injunction directing the defendants to pay to the plaintiff pension at the rate of Rs. 29,700/- per month from March 2005 and to continue to pay such sum per month during the entire life time of the plaintiff;
- d) Decree of mandatory injunction directing the defendants to purchase annuity from the Life Insurance Corporation of India of such value as would yield sufficient returns for the payment of the plaintiff's past dues as well as future entitlement on account of pension;
- e) Further interest and interest on judgment at the rate of 18% per annum;

4. The case made out by the plaintiff may be summarized thus:

- a) By an instrument dated April 29, 2000, WPIL, the defendant No. 1, created a Superannuation Fund for its employees. The plaintiff had been working with the defendant No. 1 from April 16, 1980 and ultimately, retired as the Managing Director. By an instrument dated July 12, 2001 certain clauses of the instrument dated April 29, 2000 were amended.
- b) The plaintiff retired from WPIL on June 24, 2002 and on such retirement, he became entitled to pension according to rules and regulations of the Fund @ 29,700/- a month from July, 2002.
- c) As the defendants did not pay such amount, the plaintiff wrote several letters to the defendants claiming the amount of pension and by a letter dated March 17, 2003 WPIL acknowledged its liability and requested him to bear with them on the ground that it was incurring losses and having negative cash-flows.
- d) In a meeting held on June 11, 2003 the then Managing Director of WPIL proposed for the first time to apply a case of revised Superannuation Scheme upon the plaintiff. It was decided that according to revised scheme, an annuity would be purchased by investing Rs. 15,00,000/- for ensuring the pension of the plaintiff and that he would be paid a sum of Rs. 5,00,000/- on an adhoc basis. Such proposal was not acceptable to the plaintiff, as according to him, he was entitled to pension according to the scheme that was in force at the time of his retirement.
- e) In such circumstances, the plaintiff filed an application for winding up of WPIL. By an order dated June 28, 2004, the application was disposed of by directing the plaintiff to accept pension offered by WPIL without prejudice to his rights and relegating him to appropriate proceedings for realization of his balance claims.
- f) For the period from July, 2002 to June, 2004 the defendant did not pay any pension at all and for this period, the plaintiff was entitled to at the rate of monthly pension of Rs. 29,700/- with interest @ 18% per annum. The plaintiff further claimed that from July, 2004 to February 28, 2005 the defendants paid him a monthly pension of Rs. 14,155/- though he was entitled to pension of Rs. 29,700/- a month, and therefore, he was entitled to the unpaid amount with

interest @ 18% per annum and, thus, on March 1, 2005 he became entitled to Rs. 10,77,640/- as detailed in the plaint.

5. The suit was contested by the defendants by filing a joint written statement and their defence is as follows:

a) The plaintiff had no cause of action. The claim was barred by limitation. The suit was bad for misjoinder and non-joinder of parties. The plaintiff had no right to sue WPIL. The trust was not a party to the suit.

b) The instruments relied on by the plaintiff were amended with effect from April 1, 2002 by an instrument dated October 30, 2003 and the plaintiff is entitled to pension in accordance only with Clause 8(b) of the instrument dated October 30, 2003 and in terms of the provisions of the said clause, the trustees of the trust have purchased an annuity from LIC, and out of such annuity the plaintiff is getting his pension from LIC. The WPIL has paid in excess of what the plaintiff is entitled to under the agreement. Since March 17, 2003 the pension was given to the plaintiff by the trustees for the trust.

c) The plaintiff himself was instrumental in execution of the instrument dated July 12, 2001, and hence, he had no right to rely on the said instrument. It was executed in breach of fiduciary duty owed by the plaintiff to WPIL. The said instrument was not binding upon WPIL.

6. At the time of hearing of the suit, the plaintiff examined himself as the sole witness in support of his case and various documents were marked as exhibit on behalf of the plaintiff being Exhibits A to R. The defendants, however, did not examine any witness nor did they produce or prove any documents in support of their case made in their written statement. The instruments dated April 29, 2000, July 12, 2001 and October 30, 2003 have been marked as Exhibit G, H and R respectively and the agreement dated February 26, 2002 and the letter dated March 17, 2003 have been marked as Exhibits D and K respectively.

7. As pointed out earlier, the learned Trial Judge on consideration of the materials on record, came to the conclusion that the subsequent agreement dated October 30, 2003 which has been given effect to retrospectively from April, 2002 was not binding upon the plaintiff as by a subsequent scheme, the right of the plaintiff cannot be curtailed in his absence. The learned Trial Judge further found that the learned advocate appearing on behalf of the defendants, at the time of final hearing, even did not press the case made out in the written statement.

8. The learned Trial Judge, accordingly, passed a decree by declaring that the plaintiff was entitled to a principal amount as mentioned in the plaint with interest @12% per annum and a further sum of Rs. 29,700/- a month in terms of Rule 11(a) and Exhibit G as amended by Exhibit H.

9. Being dissatisfied, the defendants have come up with the present appeal.

10. Mr. Mukherjee, the learned Senior Advocate, appearing on behalf of the

appellants, at the very outset, conceded before us that as his clients, at the stage of argument before the learned Trial Judge, did not press the defence taken in the written statement and at the same time, no independent evidence was adduced on their behalf in support of such defence, the law stood in the way of his clients to take those defences at the appellate stage. Mr. Mukherjee, therefore, restricted his submissions on the basis of materials already on record and tried to convince us that on the basis of those materials, the learned Trial Judge ought to have held that the plaintiff failed to prove his case.

11. According to Mr. Mukherjee, in a civil litigation, the plaintiff is required to prove his case and the onus is upon him to prove the basis of his claim even if the defendants do not file any written statement or do not lead any evidence on their behalf. Mr. Mukherjee contends that in this case, the plaintiff has admitted in his evidence that the defendants have done their parts of the obligation by depositing the required amount before the LIC for purchasing the annuity for the purpose of payment of the pension to the plaintiff and as such, his clients cannot be blamed if the outcome of such deposit is not sufficient to cover the monthly pension payable to the plaintiff under the agreement i.e. a sum of Rs. 29, 700/- a month. Mr. Mukherjee points out that under the terms of the agreement for grant of pension, there is of course provision of payment of additional amount by the employer but such amount, Mr. Mukherjee contends, cannot be claimed as a matter of right because payment of any additional amount is at the "discretion" of the employer. By referring to different dictionaries and legal authorities, Mr. Mukherjee submitted that such additional amount payable at the "discretion" of the employer cannot be enforced by filing a suit. In other words, Mr. Mukherjee submits that the learned Trial Judge erred in law in misreading the provisions of grant of pension. Mr. Mukherjee, in his usual fairness, did not press the defence that the amount of pension should be payable at the rate fixed by the subsequent scheme framed in the month of October 2003 with retrospective effect from April 2002 which was taken in the written statement as such plea was abandoned in the Trial Court. In support of his contention, Mr. Mukherjee relied upon the following decisions:

- 1) Krishena Kumar and Others Vs. Union of India and others,
- 2) The Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd.,
- 3) Dundee General Hospital Board of Management v. Walker and Anr. reported in 1952 (1) All ELR 896;
- 4) Charlotte F. Gisborne, Louisa Mann, and Ors. v. Walter Joseph Gisborne and Ors. reported in 1877 H. 1 (E) 300;

12. Mr. Mitra, the learned Senior Advocate appearing on behalf of the plaintiff/respondent, on the other hand, has opposed the aforesaid contentions of Mr. Mukherjee and has fully adopted the reasons given by the learned Trial Judge. According to Mr. Mitra, the appellants having taken specific defence of adoption of the amended scheme introduced in the month of October 2003 with the

assertion that the same was given effect to from April 2002 and having specifically contended in the written statement that the pension is payable at the rate mentioned in that amended scheme and that no further amount is payable to the plaintiff, the learned Trial Judge was quite justified in not permitting the defendants from deviating from that stance and in taking a plea at the stage of trial that the defendants have deposited the required amount with the LIC for implementation of the original scheme of pension entered into between the parties during the service-tenure of the plaintiff. Mr. Mitra, therefore, prays for dismissal of the appeal as the defendants failed to prove their specific defence and no evidence has been adduced by the defendants to indicate that the required amount for payment of monthly pension payable in accordance with the original scheme since amended during the service-tenure of the plaintiff had been deposited by the defendants with the LIC.

13. Therefore, the question that arises for determination in this appeal is whether the learned Trial Judge from the materials on record rightly decreed the suit.

14. In the case before us, it is the specific plea of the plaintiff that a scheme of pension was introduced by the employer vide Ext-G dated 29th April, 2000 and the same was subsequently amended by Ext-H dated July 12, 2001 during his period of service and that in accordance with Ext-G subject to Ext-H, his monthly amount of pension will be Rs. 29,700/-on the basis of 3% of pensionable salary for each year of service subject to maximum 75% of the last salary drawn and as such, it was the duty of the defendants to purchase sufficient amount of annuity from LIC for making payment of such amount. The specific defence of the defendants in this regard is that the plaintiff is entitled to get pension not according to Ext-G read with Ext-H but according to Ext-G read with Ext-S dated October 30, 2003, the subsequent amendment made in the month of October 2003 which was given effect to from April 2002 and according to such amendment vide Ext-S, the amount of pension payable will be 15% of the basic salary for every completed year of service. In paragraph 25 of the written statements, the defendants have specifically averred that the trustees have already purchased annuity from LIC for making payment of the pension at the rate of 15% of basic salary for every completed year of service.

15. In view of such defence taken by the defendants in their written statement, the only question that had fallen for determination in the suit was whether the amount of pension should be payable according to the Original Scheme Ext-G subject to the subsequent amendment viz. Ext-H or in accordance with the further amendment of October 30, 2003 (Ext-S) to the original one viz. Ext-G.

16. But the fact remains that by virtue of the defence taken in the written statements, the entitlement of the plaintiff to get pension is admitted and the only dispute is as regards the amount actually payable. Once the defendants have made such admission of entitlement of the plaintiff, onus shifts upon them to show the original entitlement of the plaintiff is lawfully reduced due to

subsequent amendment of scheme after the retirement of the plaintiff in the month of July 2002.

17. We have already pointed out that the learned advocate for the defendants did not assert either at the time of final hearing of the suit or at the time of hearing of this appeal that the plaintiff was bound by Ext-S which was given effect to from April 2002 although the same was executed on October 30, 2003, yet, tried to make out a new case not pleaded in the written statement that the amount of annuity purchased by the defendants was in accordance with the original scheme as amended by Ext-H, but due to drop of interest-rate in this country, such amount is not sufficient to pay Rs. 29,700/- a month to the plaintiff. On the basis of this plea, not borne out by the pleading, the defendants contended that it was within the "discretion" of the defendants to release further amount as mentioned in scheme and that discretionary power of the defendants cannot be enforced by filing a suit.

18. In our opinion, in view of the assertion of the defendants in paragraph 25 of the written statements that the defendants purchased annuity in accordance with the amended scheme Ext-S, there is clear admission of the defendants that they did not purchase sufficient amount of annuity in accordance with the terms of Ext-G read with Ext-H for paying the plaintiff's pension and thus, the question of enforcing the discretionary power reserved with the defendants does not arise. It is not part of the duty of the plaintiff to prove how much amount of annuity was purchased by the defendants for the payment of the pension of the plaintiff and in the absence of any evidence given by the defendants disclosing the amount invested by them, the learned Single Judge rightly turned down the new plea of the defendants which is inconsistent with the admission of the defendants in paragraph 25 of the written statement. So long the defendants did not amend such written statement and explained their admission by giving positive evidence in support of their plea that the amount invested was in accordance with the terms of Ext-G read with Ext-H, there is no scope of permitting the defendants to take the new plea sought to be raised at the time of trial that they deposited the required amount for payment of the pension of the plaintiff in accordance with Ext-G read with Ext-H.

19. As pointed out by the Supreme Court in the case of Karnail Singh v. Trilochon Singh reported in 40 ELR 435, evidence should be led strictly according to the pleading and a party who proposes to set up a case at variance with his pleading should first apply for an amendment thereof and it will then be for the learned Trial Judge to decide whether amendment should be allowed at that stage. In the case before us, the appellant never prayed for amendment of paragraph 25 of the written statement for the purpose of explaining the admission about purchase of annuity in accordance with Ext-S and thus, there is no scope of any argument that the amount deposited for purchasing the annuity was in accordance with the Ext-G read with Ext-H.

20. We are convinced that by virtue of Ext-S, the subsequent amendment of the

scheme effected on October 30, 2003 the accrued right of the plaintiff cannot be taken away as the plaintiff was not party to the amendment of October 30, 2003 when he had already retired in the month of June, 2002.

21. We, thus, find no reason to deal with the point raised by Mr. Mukherjee on the question of enforcement of the discretionary power vested in the defendants for release of additional money as there is no foundation of such plea in the pleading of the defendants and at the same time, the defendants admitted in their written statement that they purchased annuity in accordance with amended scheme of October 2003 which is much less than the one required to be deposited in accordance with Ext-G read with Ext-H.

22. We, therefore, find that the decisions cited by Mr. Mukherjee regarding the scope of enforcing discretionary power vested in a trustee are inconsequential in the facts of the present case and we, accordingly, although do not dispute the propositions laid down therein, hold that in view of the aforesaid admission of the defendants in their written statement, those are inapplicable in support of the defence.

23. The appeal is thus devoid of any substance and is dismissed with costs to be borne by the appellants.

24. I agree.