

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 596/2012

Reserved on : 26.7.2017

Decided on : 31.7.2017

Rohit Kumar

.....Appellant

Versus

Tata Tele Services Limited and others

....Respondents

Coram:

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?¹ Yes

For the appellant: Mr. J.L. Bhardwaj, Advocate.

For the respondents: Ms. Bhawna Dutta, Advocate.

Tarlok Singh Chauhan (oral):

This Regular Second Appeal under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 26.7.2012, passed by the learned Additional District Judge, Fast Track Court, Shimla, in Civil Appeal No. 54-S/13 of 2009, whereby he affirmed the judgment and decree dated 20.8.2009, passed by the learned Civil Judge (Junior Division), Court No.7, Shimla in Civil Suit No. 4-1 of 2006.

2. The plaintiff is the appellant, who filed a suit for recovery of Rs. 2,12,000/- along with interest @ 12% per annum

¹ Whether reporters of the local papers may be allowed to see the judgment? Yes.

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before the learned trial court on account of harassment that was meted out to him by the defendants/respondents and declaration was also sought to the effect that his termination order dated 8.9.2007 passed by defendant No.3 be declared as null and void being illegal and arbitrary. It was consequentially prayed that the defendants be directed to reinstate the plaintiff in service along with all consequential benefits including seniority, arrears etc.

3. The defendants contested the suit by filing written statement taking therein various preliminary objections like *locus standi*, cause of action, estoppel etc. It is further averred that the work and conduct of the plaintiff was not satisfactory, he remained absent from duty without any intimation to his superiors and also mis-conducted himself.

4. The learned trial court framed the following issues:

- 1) *Whether the termination of plaintiff vide order dated 8.9.2007 by defendant No.3 is illegal and arbitrary and to be declared null and void, as alleged? OPP*
- 2) *Whether the plaintiff is entitled for the recovery of Rs. 2,12,000/- along with interest, as prayed for? OPP*
- 3) *Whether the plaintiff has cause of action and locus standi to file the present suit? OPP*
- 4) *Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD*

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- 5) *Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD*
- 6) *Relief.*

5. After recording the evidence and evaluating the same, the learned trial court dismissed the suit vide impugned judgment and decree dated 20.8.2009 constraining the plaintiff to file an appeal before the learned first appellate court, who too, dismissed the same vide impugned judgment and decree dated 26.7.2012. Hence, the plaintiff has filed the instant regular second appeal, which came to be admitted on 4.4.2013 on the following substantial questions of law:

1. *Whether the findings recorded by the Ld. Lower Appellate Court to the effect that the dispute is covered within the purview of Labour Court and not within the jurisdiction of Civil Court are sustainable in view of the Constitutional Bench decisions of the Hon'ble Supreme Court reported in AIR 1966 SC 492, AIR 1969 SC 78 and the decision reported in (2009) IV SCC 299?*
2. *Whether the findings recorded by the Ld. Courts below that the respondents could have terminated the services of the appellant without service notice meets the requirement of principles of natural justice as per the decision passed in (2001) 1 SCC 61?*
3. *Whether the findings recorded by the Ld. Courts below that Indus Hospital is not an empanelled Hospital of the Company as per the statement of DW-1 are sustainable especially when, the said fact has not been denied by the respondents*

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while filing the written statement and the said findings are contrary to the material placed on record?”

6. I have heard learned counsel for the parties and have also gone through the record of the case carefully.

SUBSTANTIAL QUESTION OF LAW NO.1

7. This question is no longer *res integra* in view of the judgment rendered by the Hon’ble Supreme Court in ***Premier Automobiles Ltd. vs. Kamlekar Shantaram Wadke of Bombay and ors. (1976) 1 SCC 496***, wherein the Hon’ble Supreme Court after analyzing various case laws and principles dealing with the jurisdiction of the civil court in relation to an industrial dispute, crystallized the scope and ambit of the jurisdiction of a civil court under Section 9 of the Code of Civil Procedure as follows:-

“(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

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(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either section 33C or the raising of an industrial dispute, as the case may be.”

8. However, the Hon’ble Supreme Court in Premier Automobiles Ltd. (supra) observed at para 24 of the judgment as follows:

“24. We may, however, in relation to principle 2 stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2A of the Act will be an industrial dispute even though it may otherwise be an individual dispute. Civil Courts, therefore, will have hardly an occasion to deal with the type of cases falling under principle 2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by principle 3 stated above.”

9. In **Rajasthan State Road Transport Corporation and anr. vs. Krishna Kant and ors., 1995 5 SCC 75**, the Hon’ble Supreme Court summarized the legal position in this regard as follows:-

“(1) Where the dispute arises from general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in civil court cannot be said to be not

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maintainable, even though such a dispute may also constitute an "industrial dispute" within the meaning of Section 2(k) or Section 2-A of the Industrial Disputes Act, 1947.

(2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment (Standing Orders) Act, 1946 - which can be called 'sister enactments' to Industrial Disputes Act - and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2-A of Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to Civil Court is open.

(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government.

The power to make a reference conferred upon the government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex-facie. The power conferred is the power to refer and not the power to decide, though it may be that the government is entitled to

examine whether the dispute is ex-facie frivolous, not meriting an adjudication.

(5) Consistent with the policy of law aforesaid, we commend to the Parliament and the State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly - i.e., without the requirement of a reference by the government - in case of industrial disputes covered by Section 2-A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Order) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to "statutory provisions". Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created by the Industrial Disputes Act or the Civil Court where recourse to Civil Court is open according to the principles indicated herein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and un-encumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the Courts and Tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.

10. On noticing some conflicts in the judgments of the Hon'ble Supreme Court over the issue, a three Judges Bench of the Hon'ble Supreme Court in ***Rajasthan State Road Transport Corporation and anr. vs. Bal Mukund Bairwa, 2009 4 SCC 299*** revisited the law laid down with regard to jurisdiction of the civil courts to entertain the suits regarding the service conditions of a workman. In the aforesaid case, it was held that:-

"If an employee intends to enforce his constitutional rights or a right under a statutory Regulation, the civil court will have the necessary jurisdiction to try a suit. If, however, he claims his right and corresponding obligations only in terms of the provisions of the Industrial Disputes Act or the sister laws so called, the civil court will have none. In this view of the matter, in our considered opinion, it would not be correct to contend that only because the employee concerned is also a workman within the meaning of the provisions of the 1947 Act or the conditions of his service are otherwise governed by the Standing Order certified under the 1946 Act ipso facto the Civil Court will have no jurisdiction. This aspect of the matter has recently been considered by this Court in Rajasthan State Road Transport Corporation & ors. vs. Mohar Singh (2008) 5 SCC 542. The question as to whether the civil court's jurisdiction is barred or not must be determined having regard to the fact of each case. If the infringement of Standing Order or other provisions of the Industrial Disputes Act are alleged, the civil court's jurisdiction may be held to be barred but if the suit is based on the violation of principles of common law or constitutional provisions or on

other grounds, the civil court's jurisdiction may not be held to be barred. If no right is claimed under a special statute in terms whereof the jurisdiction of the civil court is barred, the civil court will have jurisdiction.

Where the relationship between the parties as employer and employee is contractual, right to enforce the contract of service depending on personal volition of an employer, is prohibited in terms of Section 14(1)(b) of the Specific Relief Act, 1963. It has, however, four exceptions, namely, (1) when an employee enjoys a status, i.e., his conditions of service are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India or a statute and would otherwise be governed by Article 311(2) of the Constitution of India; (2) where the conditions of service are governed by statute or statutory Regulation and in the event mandatory provisions thereof have been breached; (3) when the service of the employee is otherwise protected by a statute; and (4) where a right is claimed under the Industrial Disputes Act or sister laws, termination of service having been effected in breach of the provisions thereof.

Appellant - Corporation is bound to comply with the mandatory provisions of the statute or the regulations framed under it. A subordinate legislation when validly framed becomes a part of the Act. It is also bound to follow the principles of natural justice. In the event it is found that the action on the part of State is violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules, the civil court would have the jurisdiction to direct reinstatement with full back wages.”

11. In **R.S.R.T.C. vs. Deen Dayal Sharma, 2010 AIR (SC) 2662**, the Hon’ble Supreme Court in a case where a

workman was dismissed without any departmental enquiry as contemplated in the standing orders, held that the nature of right sought to be enforced would be decisive in determining whether the jurisdiction of the civil court is excluded or not. Since in the aforesaid case, the workman had hardly served for three months but had asserted his rights of a departmental enquiry as contemplated under the standing orders, the Hon'ble Supreme Court held that the civil court had no jurisdiction to entertain and try the suit filed by the aforesaid workman as such right of departmental enquiry under the standing orders could have been enforced by him only by raising an industrial dispute and not by way of a civil suit.

12. Adverting to the facts, it would be noticed that though the plaintiff is a workman, but he had not invoked any of the provisions of the Industrial Disputes Act or its sister's Act and had approached the civil court for redressal of his grievances invoking general or common law, therefore, such suit was clearly not barred under Section 9 of the Code of Civil Procedure. The substantial question of law is answered accordingly in favour of the plaintiff.

SUBSTANTIAL QUESTION OF LAW NO.2

13. There is no dispute that the contract between the parties is a contract of private employment, i.e. the contract in question is not one of public employment where the plaintiff has offered any services to an entity which is a “State” within the meaning of article 12 or 226 of the Constitution of India. With respect to the private contracts of personal service, it is settled law that contracts of personal service are not enforceable as is evident from the perusal of Section 14 of the Specific Relief Act, 1963, which reads thus:

“14. Contracts not specifically enforceable.—

(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it,

sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.”

14. Obviously, therefore, there cannot be a decree for performance of the contract and even if there is a breach of contract, the maximum entitlement of an employee would be for damages.

15 In **S.S. Shetty vs. Bharat Nidhi Ltd, AIR 1958 SC 12**, the Hon'ble Supreme Court held that in case of illegal termination of employee by a private employer, at best the employee is entitled to the salary for the notice period.

13. In **Binny Ltd. vs. V. Sadasivan (2005) 6 SCC 657**, the Hon'ble Supreme Court held that public policy principles or administrative law principles do not apply to private employment. Employment in private sector is governed by the terms and conditions of the employment.

14. Therefore, what cannot be done directly cannot be permitted to be done indirectly i.e. if there cannot be any specific performance of the contract, obviously, there cannot be a declaration and injunction to continue such a service contract.

15. As to contract of personal service involving the relationship of master or servant, Halsbury lays down "*A judgment for specific performance of a contract for personal work or services is not pronounced, either at the suit of the employer or*

the employee. The Court does not seek to compel persons against their will to maintain continuous personal and confidential relations.” The aforesaid para was quoted with approval by the Hon’ble Supreme Court in ***Nandganj Sihori Sugar vs. Badi Nath Dixit, AIR 1991 SC 1525*** at page 1528. However, this rule is not absolute and subject to well known exceptions.

16. A contract of employment cannot ordinarily be enforced by or against an employer. The remedy is to sue for damages. ***(Refer: Vaish Degree College vs. Lakshmi Narain, AIR 1976 SC 888)***

17. When the relationship is one of master and servant, a suit for declaration that an employee is still in service, the employment having been terminated is hit by Section 14(1)(b) of the Specific Relief Act and is not tenable. ***(Refer: S.R. Tiwari vs. District Board, Agra AIR 1964 SC 1680 and Executive Committee of U.P. State vs. Chandra Kiran Tyagi, AIR 1970 SC 1244).***

18. Thus, it can be taken to be well settled that a contract of private employment is not similar to the public appointment and in such private employment there is no scope

of applicability of public policy principles or administrative law principles.

19. In a contract of employment, which provides for termination of service by a notice, the duration whereof is specified, then at best, the employee would be entitled to pay of such duration specified in the notice and would not be entitled to any relief of continuation in service or pay with consequential benefits for the alleged remaining period of service. As per the provisions of Section 14(1)(c) of the Specific Relief Act, a contract which is determinable in nature cannot be specifically enforced.

20. From the aforesaid discussions, following principles can be culled out:-

1. As to contract of personal service involving the relationship of master or servant, a judgment for specific performance of a contract for personal work or services is not pronounced, either at the suit of the employer or the employee. The Court does not seek to compel persons against their will to maintain continuous personal and confidential relations.
2. A contract of employment cannot ordinarily be enforced by or against an employer. The remedy is to sue for damages.

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3. When the relationship is one of master and servant, a suit for declaration that an employee is still in service, the employment having been terminated is hit by Section 14(1)(b) of the Specific Relief Act and is not tenable.

21. In view of the above principles, the suit filed by the plaintiff was clearly misconceived apart from being not maintainable for want of jurisdiction, but on account of reliefs sought therein. The substantial question of law is answered against the plaintiff.

SUBSTANTIAL QUESTION OF LAW NO.3

22. In view of answer to substantial question of law No.2 (supra), this question has lost its efficacy, therefore, need not be answered.

23. For the forgoing discussion, there is no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

(Tarlok Singh Chauhan)
Judge

31st July, 2017
(pankaj)