

(2001) 03 BOM CK 0077

Bombay High Court

Case No: Second Appeal No. 135 of 1991

Samarjit Datta

APPELLANT

Vs

M/s PMT Machine
Tools Automatics Pvt.
Ltd. and Another

RESPONDENT

Date of Decision: March 31, 2001

Acts Referred:

- Constitution of India, 1950 - Article 12, 226, 227, 311
- Contract Act, 1872 - Section 23
- Specific Relief Act, 1963 - Section 14, 34, 41

Citation: (2001) 3 ALLMR 481 : (2001) 4 BomCR 191 : (2001) 3 BOMLR 836

Hon'ble Judges: S.A. Bobde, J

Bench: Single Bench

Advocate: Shri R.S. Kulkarni and T.R. Yadav, for the Appellant; Shri S.S. Naphade and K.S. Bapat, instructed by M/s Haresh Mahta and Co., for the Respondent

Final Decision: Dismissed

Judgement

S.A. Bobde, J.

This Second Appeal is preferred by the Appellant who seeks a declaration that his termination order is illegal and not binding on the plaintiff and a further declaration that he continues in service of the Respondent Company. The Trial Court and the First Appellate Court have both dismissed the Appellant's suit. This Second Appeal has been admitted by this Court on the question of applicability of the decision in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly, and Another, and the decision of the Supreme Court in Sirsi Municipality by its President, Sirsi v. Cecelia Kom Francis Tellis. However, according to the learned Counsel for the Appellant the substantial question of law that needs to be decided in this case is :

Whether the declaration sought for in prayer clause (1) can be granted by the Civil Court u/s 34 of the Specific Relief Act?

This substantial question of law has been therefore framed with the consent of the learned Counsel for the Respondent and in fact arguments have principally been addressed to this question.

2. The undisputed facts are that the Appellant was employed under a contract dated 15.5.1964, Exh.41 with the Respondent Company as a permanent member of the staff. He was employed as Senior Supervisor. Thereafter the Appellant's services were terminated on 17.8.1981 by the Company on the ground that his services are no longer required. It is common ground that the services were not terminated on account of any misconduct but constitute a discharge simpliciter.

3. The Appellant, therefore, filed the present suit in which he prayed for the following reliefs :

(i) The Termination Order of the Defendant Company dated 17th August, 1981 be declared to be illegal, void ab initio and not binding on the plaintiff, and further that the Plaintiff continues in the services of the Defendant Company.

No further relief of reinstatement and consequential benefits was sought in the suit.

4. The Trial Court after recording evidence dismissed the Appellant's suit and recorded the finding that the termination of the Appellant's services was not Illegal. It has also recorded a finding that the Executive Director of the Company had authority to terminate the services of the Appellant and the Appellant is not entitled to continue in the services of the Respondent Company.

5. The Appellant carried an appeal to the Court of the 6th Additional District Judge, Pune. The learned Additional District Judge concurred with the Trial Court on all the issues and dismissed the appeal. The learned Appellate Court has rendered a categorical finding that the Executive Director of the Respondent Company one S. B. Desai was authorised by the power of the Directors to terminate the services of the Appellant therefore the termination order is not illegal on that count. The learned Appellate Court has further rendered a finding that the Appellant was employed in a managerial post and he was not governed by any Labour Laws and the termination in question was a simple discharge. There is no contractual or statutory obligation on the Respondent to hold a Departmental Enquiry before termination. The learned Appellate Court has further found that the Appellant has been paid 3 month's salary by letter dated 30.8.1981. The learned Appellate Court therefore dismissed the suit.

6. Mr. Kulkarni, learned Counsel for the Appellant submitted that termination order is void and Illegal on the ground that it suffers from non-compliance of principle of natural justice and not in accordance with the mode of termination provided for in contract.

Clause 13 of the Service Agreement reads thus :

"Clause 13. The Company has the right to terminate this Agreement any time before the term of five (5) years by giving three (3) months" notice on the happening of any of the following events :

(a) If the present business of the Company is suspended for reasons beyond the control of the Company;

(b) In case of the closing up of the factory of the Company on account of unforeseen circumstances such as war, fire, riot, strike, or force major or the Company being wound up for any purpose or on any account whatsoever;

(c) If the employee is incapacitated or disabled by physical or mental injury as a result of accident or as a result of continued ill health rendering him medically unfit for work.

The Employee shall not be entitled to any other damages, except for three month"s notice period, or three month"s salary in lieu."

7. According to Mr. Kulkarni since none of the ingredients prescribed by sub-clauses (a), (b) and (c) of Clause 13 were in existence the termination of the Appellant"s services is illegal. Further the termination is also illegal because it was not preceded by 3 months" notice. Having regard to clause 13 as above, two things emerge clearly viz. (1) that clause entitles the Respondent to terminate the contract before a term of 5 years by giving 3 months" notice and (2) on the happening of any of the events specified therein. It is clear from the present case that the present termination is not one under the Clause 13 since It is not before 5 years nor on the happening of events specified therein. I am therefore, of the view that the present termination is not one under Clause 13.

8. Though Mr. Kulkarni did refer to clause 14 which provides for termination on the ground of certain misconduct or lack of fitness on the part of the employee, it was fairly conceded by him that the termination is not on account of any misconduct. It is therefore clear that said clause has no application. I am, therefore, of view that there is no force in the submission that the termination is in breach of principles of natural Justice, assuming that the principles of natural justice are attracted to such a case. Mr. Kulkarni further submitted that reading of clauses 13 and 14 clearly points out that termination was illegal in that It was effected By the Executive Director of the Respondent Company and not by the Company or the Board of Directors. This fact to my mind is a question of fact which has been decided by the Appellate Court against the Appellant on a finding that Executive Director was authorised by the Board of Directors to terminate the services of the Appellant, Nothing is pointed out, which would show that the Executive Director was not authorised to terminate the Appellant"s services.

9. It is clear in the facts of the present case that even if the Appellant be right that his termination is not in accordance with the contract he is entitled to succeed only if he is

found entitled to a declaration simplicitor and to an order of reinstatement and consequential benefits. It is an admitted position that had the Appellant been in service, he would have retired on 1.4.1996 and there is therefore at this stage no occasion to consider the question of actual reinstatement of the Appellant at this stage. It is nevertheless argued on behalf of the Appellant that in the event the termination order is declared to be illegal and it is declared that he was entitled to be continued in service the Appellant would be entitled to monetary benefits that would have been available had he been in service.

10. It is therefore, clear that the main question in this appeal is whether the Appellant was entitled in law to a declaration, without more, that the termination order dated 17.8.1981 is illegal, void ab initio and not binding on the Appellant and the further declaration that the Appellant continues in service of the Respondent Company.

11. The learned Counsel for the Appellant submitted that Courts below have fallen in error in holding that a contract of personal service cannot be enforced and that a Court normally would not give a declaration that the contract subsists. According to the learned Counsel Courts below committed a further error in accepting the argument on behalf of the Respondent that the Appellant is not entitled to declaration sought for in view of the omission to seek further relief of reinstatement and other consequential benefits.

12. The learned counsel of the Appellant relied on the decision in the case of Ashok Kumar Srivastav v. National Insurance Co. Ltd. and Ors., " in which the Supreme Court has considered whether a suit for a declaration can be entertained even if it seeks performance of contract which is not specifically enforceable u/s 34 of the Specific Relief Act. For the reasons stated later in this Judgment I am of view that the decision does not apply to the present case.

13. At the outset, it is necessary to consider the law relating to the enforceability of a term for personal services as enunciated by the Supreme Court since long. The Law as to the ground of declaration and mandatory Injunction in case of contracts for personal service has been considered by the Supreme Court on a number of occasions. Two earlier decisions are S. R. Tiwari v. the District Board. Agra. The issue was considered exhaustively in Executive Committee of Vaish Degree College, Shamli and Ors. v. Lakshmi Narain and Ors., in that case the Supreme Court after considering its earlier judgment in S. R. Tiwari v. District Board, Agra, Indian Air Lines Corpn. v. Sukhdeo Rat, and Sirsi Municipality by its President. Sirsi v. Cecelia Kom Francis Tellis, that a contract of personal service cannot ordinarily be specifically enforced, observed as follow :-

" 17. 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."

14. On a subsequent occasion a similar question arose for the decision of the Supreme Court in *Sitaram Kashiram Konde v. Pigment Cakes and Chemicals Mfg. Co.* That was a case in which the plaintiff alleged certain illegal acts on the part of his employer and inter alia made a prayer in the suit that his removal from the service was illegal and that the defendant be ordered to reinstate, the plaintiff to his job with due benefits and damages. In that case one of the questions in dispute was whether the reliefs were triable by the Civil Court, or by the Industrial Court. After referring to its earlier decisions the Supreme Court observed as follows :-

"After having appreciated the entire facts and the circumstances of the case we are of the opinion that it is not quite correct to say that the suit filed by the appellant is not maintainable at all in a Civil Court. The correct position of law is that the main reliefs asked for by him which when granted will amount to specific performance of the contract of service and therefore they cannot be granted."

15. In *Central Inland Water Transport Corporation Ltd. and Anr., v. Brojo Nath Ganguly and Anr.*, the Supreme Court observed in para 104 of this judgment as follows :-

The contesting Respondents could, therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9(i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the Civil Court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. As the Corporation is "the State", they, therefore, adopted the far more efficacious remedy of filing a writ petition under Article 226 of the Constitution,"

16. In *State of Madhya Pradesh v. Mangilal Sharma*, a question arose as to the nature of a decree that can be passed by a Civil Court in a suit u/s 34 of Specific Relief Act, 1963 and the manner in which it could be executed. An employee of the State of Madhya Pradesh whose services stood terminated, filed a suit for a declaration against that State that he continues to be in service. That suit was decreed and the Court granted a declaration that the Plaintiff is still in continuous service of the defendant and his services are not terminated. A first appeal and the second appeal against the said Judgment were dismissed. The decree holder then levied execution of the decree in the Civil Court and sought all consequential benefits of salary, D. A., promotion etc., of service and also costs of the application. The execution was opposed by the State of Madhya Pradesh on the ground that there was no decree for reinstatement for decree holder to the post or for payment of salary to him and that in the suit the decree holder has not prayed for

reinstatement or for arrears of salary. All these objections were dismissed by the Executing Courts as well as this Hon"ble Court as a result of which the State approached the Supreme Court. While dealing with this appeal the Supreme Court observed that the suit for a mere declaration without any further reliefs was barred by virtue of Section 34 of Specific Relief Act. It observed :

6. "A declaratory decree merely declares the right of the decree holder vis-■-vis the Judgment debtor and does not in terms direct the judgment debtor to do or refrain from doing any particular act or thing. Since in the present case decree does not direct reinstatement or payment of arrears of salary the Executing Court could not issue any process for the purpose as that would be going outside or beyond the decree. Respondent as a decree holder was free to seek his remedy for arrears of salary in the suit for declaration. The Executing Court has no Jurisdiction to direct payment of salary or grant any other consequential relief which does not flow directly and necessarily from the declaratory decree. It is not that if in a suit for declaration where the plaintiff is able to seek further relief he must seek that relief though he may not be in need of that further relief. In the present suit the plaintiff while seeking relief of declaration would certainly have asked for other reliefs like the reinstatement, arrears of salary and consequential benefits. He was, however, satisfied with a relief of declaration knowing that the Government would honour the decree and would reinstate him. We will therefore assume that the suit for mere declaration filed by the respondent plaintiff was maintainable, as the question of maintainability of the suit is not in issue before us."

Their Lordships observed that though the plaintiff had not sought relief for reinstatement, the Government had granted him the relief only on the strength of the declaration that he continued to be in service. This came about because the legal position of Government servants is more one of status than of contract and the declaration as to his status rightly resulted in the Government reinstating the respondent therein.

17. Eventually, while considering the submission made on behalf of the decree holder that the necessary consequences of a declaration about the legal status of the decree holder was that he should be granted all arrears of salary and other consequential benefits by the State of Madhya Pradesh, Their Lordships observed as follows :-

"It was, therefore, submitted by him that once the Court gave a declaration about the legal status of the respondent that he was still in continuance of service of the appellant and his services were never terminated, the necessary consequence would be that the respondent should be granted arrears of salary and other consequential benefits by the appellant unlike in a case which was governed by law of contract between the parties. It is difficult to accept this proposition as the provisions of law contained in Section 34 of the Specific Relief Act are specific and in that case even declaration could not have been granted as It could be said that respondent was able to seek further relief than a mere declaration of his legal status and which he omitted to do so."

Applying the observations of the Supreme Court in the above cases to the Appellant's suit it would be clear that the Appellants would not be entitled to a declaration since he has omitted to seek further relief as is required by Section 34 of the Specific Relief Act.

18. It is clear from the above decision, that unless a plaintiff is covered by any of the three exceptions as formulated by the Supreme Court in para 17 of its decision i.e. :

(1) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India. (2) where a worker is sought to be reinstated on being dismissed under the Industrial Law, and (3) where a statutory body acts in breach or violation of the mandatory provisions of the statute he will not normally be entitled for a declaration that contract subsists. Further, that when the main reliefs asked for by a plaintiff when granted amount to a specific performance of a contract for personal service they will not be granted. Even where a declaratory decree is granted as in the case of a Government servant and the Court has not granted a decree for reinstatement or other reliefs since they were not sought an Executing Court would have no jurisdiction to issue process for the purpose of execution of such a decree since that would be going outside or beyond the decree.

19. In the present case it is clear that the Appellant has only prayed for a declaration that he continues to be in service. He has clearly omitted to ask for any further relief either by way of reinstatement, compensation and consequential benefits thereupon. The prayer clause in the plaint does not contain any prayer for consequential reliefs such as reinstatement, presumably because of the well known bar contained in Section 14 of the Specific Relief Act, wherein contract for personal service cannot be enforced by a Civil Court.

20. Mr. Kulkarni, learned Counsel for the Appellant however submitted that Appellant is entitled to a decree for declaration without more by reason of the Judgment of the Supreme Court in Ashok Kumar Srivastav v. National Insurance Co. Ltd., and Ors. The learned Counsel relies on observations made by the Supreme Court in para Nos. 2, 4, 5, 15, 16, 18 and 19 of that judgment. It is therefore necessary to see if the said Judgment applies to the present case. That was a case where the Appellant who was in service of the Company sued for declaration that the notice terminating his services was illegal and void and he continues to be in service of the Company with all benefits to the said post. The Company allowed the suit to be decided ex parte and also failed in objecting to the execution. After that the Company challenged the order before the High Court under Articles 226 and 227 of the Constitution of India and High Court dismissed the writ petition holding that the decree was passed by the Court having jurisdiction, and the suit was maintainable u/s 34 of the Act. It was after the dismissal of the writ petition with the Company preferred a first appeal and after being unsuccessful, preferred a second appeal before the Allahabad High Court. In the second appeal the following four questions were argued :

21. Whether the termination order is violative of the contractual term that one month's notice or pay in lieu thereof is a sine quo non; (2) whether the appellant is entitled to reinstatement without entering upon a finding that there was statutory violation; (3) whether the suit is barred under the Industrial Disputes Act, 1947 and (4) whether the suit is barred u/s 34 of the Act.

22. In particular the last question which is relevant for our purpose was not allowed to be argued on the ground that it was res judicata between the parties as a result of decision by the High Court and Writ petition under Article 226 and 227 of the Constitution of India; vide paras 8 and 9 of the report. The Supreme Court took the view that the Company was not entitled to re-agitate the question regarding maintainability of the suit u/s 34 of the Act. It is thus clear that question whether a declaration that a termination is illegal simpliciter granted by the Civil Court u/s 34 of the Specific Reliefs Act was not an issue since it was treated as res judicata. The Supreme Court repelled the contention made on behalf of the Company that the suit was in effect one for specific enforcement of a contract and since such a relief is not permissible u/s 14 of the Act the suit itself is not maintainable. While repelling the contentions Their Lordships observed as follows : "maintainability of a suit cannot be adjudged from the effect which the decree may cause. It can be determined on the basis of the ostensible pleadings made and the stated reliefs claimed in the plaint." The Supreme Court further observed in the said judgment that "Chapter II contains a fasciculus of rules relating to specific performance of contracts. Section 14 falls within the chapter and it points to contracts which are not specifically enforceable. Powers of the Court to grant declaratory reliefs are adumbrated in Section 34 of the Act which falls under Chapter VI of the Act. It is well to remember that even the wide language contained in Section 34 did not exhaust the powers of the Court to grant declaratory reliefs." The legal consequences was summed up in para 19 as follows :-

" Hence the mere fact that a suit which is not maintainable u/s 14 of the Act is not to persist with its disability of non-admission to Civil Courts even outside the contours of Chapter II of the Act. Section 34 is enough to open the corridors of Civil Courts to admit suits filed for a variety of declaratory reliefs."

On the facts of that case the Supreme Court took the view that the terminated employee had not been terminated contrary to the conditions of the employment and was not entitled to a declaration that he continues to be in service.

23. A reading of the decision in Ashok Kumar Srivastav, however does not reveal that Supreme Court considered the question as to the effect of a plaintiff omitting to sue for further reliefs while seeking a declaration. In fact a reading of paras 18 and 19 of the judgment of the Supreme Court in Ashok Kumar Srivastav's case shows that the Supreme Court was conscious of the fact that suits for enforcement of the contract for personal service are not enforceable.

24. In any event I do not see how the present appellant having taken a position that his suit is one u/s 34 of the Act is entitled to rely on the decision in Ashok Kumar Srivastav's case.

25. Mr. Naphade, learned Counsel for the Respondent has relied on an order of this Court in Notice of Motion which may in law be considered a Judgment, in the case of Chander Shekhar Malhotra v. Nirlon Limited and Ors., dated 19.8.1999 decided by S.S. Nijjar, J. in which the effect of this very Judgment of the Supreme Court in Ashok Kumar Srivastav has been considered in a similar case where the plaintiff sued for declaration that he continues in employment and he is entitled to work and salary. After an exhaustive consideration of the law laid down by the Supreme Court earlier and a construction of the judgment in Ashok Kumar Srivastav case itself, the learned single Judge came to the conclusion that the earlier position laid down by the Supreme Court of India has not been altered by the judgment of the Supreme Court in the case of Ashok Kumar Srivastav.

26. In that case the learned Single Judge has also placed reliance on Section 41 of the Specific Relief Act and held that injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced and was therefore declined to grant a mandatory injunction of reinstatement.

27. I find myself in agreement with the view of the learned Single Judge.

28. Mr. Kulkarni, learned Counsel for the Appellant relied on the observations made by the Supreme Court in the case of AIR India Statutory Corporation Etc. v. United Labour Union and Ors., to the following effect : "Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency instrumentality, juristic person or private entrepreneur it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating there from are species to make their right to life and dignity of person real and meaningful.

29. According to the learned Counsel therefore even under Specific Relief Act for personal service though otherwise enforceable, are and thereby enforceable as a matter of fundamental right. It is clear that Supreme Court made the said observations in the context of the effect of abolition of the contract labour for Industry, and while holding that the contract labour, earlier employed by the contractor would be entitled to be employed by the principle employer himself. I cannot accept the contention that the said observations would apply to a case for Specific Performance of Contract of personal service between two private persons. 29A. An argument was also advanced on the strength of the Judgment of the Supreme Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath, that the contract of employment to the extent that it enabled the termination of the plaintiff without giving any reason or notice is void since it is in breach of Article 14 of the Constitution of India and also contrary to public policy as contemplated

by section 23 of the Contract Act. It is not possible for me to apply the ratio of that case to the present case since that case dealt with a Corporation which was wholly owned by the Central Government and two State Governments jointly and was, therefore, held to be an "instrumentality of the State" under Article 12 of the Constitution of India. The respondent in the present case has no such character. There is also no challenge to the contract of employment as being violative of section 23 of the Contract Act. Moreover in this very case the Supreme Court, in Paragraph 104 of the report reproduced supra, has observed that the contesting respondents there could not have got the relief of reinstatement in a Civil Court. I do not see how this case would be of assistance to the Appellant.

30. In this view of the matter I find that the Appellant having omitted to pray for further reliefs either by way of reinstatement, compensation or other is not entitled for a mere declaration in view of the proviso to Section 34 of the Specific Relief Act. Moreover, it is not in dispute that such a relief is a discretionary relief and nothing extra ordinary shown in this case to depart from the normal rule that a Court should not ordinarily enforce a contract for personal services and give a declaration that contract subsists. That the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. In any case I am of the view that having regard to the observations of Supreme Court in Mangilal's case (supra), such a declaration would be inexecutable. It is well settled that discretion may not be exercised in a case where it would be futile.

31. Both the learned Counsel agree that it is not necessary to specifically consider the matter in the light of Sirsi Municipality case which is referred to in the substantial question of law while admitting the second appeal.

32. In the result I find no merits in the Second Appeal and the same is hereby dismissed. However, there shall be no order as to costs.