
97 CWN 419

Calcutta High Court

Case No: F.M.A.T. No. 3794 of 1991

Ajkal Publishers Ltd
and Another

APPELLANT

Vs

Himangshu Halder

RESPONDENT

Date of Decision: Dec. 14, 1992

Acts Referred:

- Industrial Disputes Act, 1947 - Section 25T

Citation: 97 CWN 419

Hon'ble Judges: Mukul Gopal Mukherji, J; Arun Kumar Dutta, J

Bench: Division Bench

Advocate: P.P. Ginwalla, Arijit Chowdhury, Arunava Ghose, Subho Kamal Mukherjee and Arundhuti Mukherjee, for the Appellant; Saktinath Mukherjee, Saptangshu Bose and Chhabi Chakravorti, for the Respondent

Judgement

Mukul Gopal Mukherji, J.

This is a defendant's appeal impugning an order of injunction dt.30th September. 1991 as passed by the learned Judge, City Civil Court 12th Bench. Calcutta in Title Suit No. 1320 of 1991 where by the learned trial judge restrained the defendant from giving effect to an impugned order of transfer to the plaintiff to Madras City as a Senior Reporter and further restrained the defendant from interfering with the service of the plaintiff as a Sub-editor in the defendant's Calcutta Office during the pendency of the suit. The plaintiff-respondent, Himangshu Halder was appointed as a Sub-editor in the Editorial Department of "Ajkal" a newspaper establishment with effect from April 1, 1987 on terms inter alia that his service will be transferable to any other Section of the Editorial Department of the company at any time. On August 7, 1991 the appellant newspaper establishment "Ajkal" served on him an order of transfer on promotion to the Reporting Department for the post of Senior Reporter with effect from 1st of September, 1991 to Madras City obviously on a higher scale of pay including outstation allowance of Rs. 1000/- per month and House Rent Allowance at the rate of Rs. 1400/- per month which

would be paid in addition to his pay and allowance as a Senior Reporter. It is the contention of the plaintiff-respondent that there is no provision of transfer of the plaintiff from one Section to another or from one post. to another within the frame work of the service conditions of defendant appellant company and that the plaintiff as a permanent workman and as terms and conditions of employment are inter governed by the Industrial Employment (Standing Orders) Act, 1946 and the Rules framed thereunder having the force of law. It was further contended by the plaintiff-respondent in his plaint that the defendant company did not frame any standing order of its own and as such the Model Standing Order under the Industrial Employment (Standing Orders) Act, 1946 will be applicable in this case. He contended further that since he gave up the membership of the Workmen's Union, the decision of the management to effect transfer was imposed on him as a mala fide action. In any view the defendant company had no right to transfer him without his consent. He prayed inter alia for a declaration that the impugned order of transfer was arbitrary, illegal and mala fide and without jurisdiction and not binding on him and he sought a further declaration to the effect that his appointment being substantively as that of a Sub-editor of the defendant company he cannot be transferred with purported or pretended promotion to a non-existing post of Senior Reporter outside the cadre with altogether a different function to discharge or perform in Madras City from where the defendant company do not publish or print any additional or supplementary version of daily "Aajkal" newspaper and his promotional channel warranted promotion to the next higher post, namely Senior Sub-editor. He also prayed for permanent injunction restraining the defendant to give effect to the impugned order of transfer on promotion dt. 7th of August, 1991 and sought an injunction restraining the defendant to interfere with his service as Sub-editor by virtue of the letter of appointment dt. March 30, 1987.

2. The Defendant-appellant Aajkal Publishers Ltd. and its Directors, Shri Asoke Das Gupta contended in the court below that since the plaintiff sought a specific performance of his contract of service and according to his own case was governed by the industrial Employment (Standing Orders) Act, 1946 as a working journalist, his remedy if any, lay before the appropriate forum under the Industrial Disputes Act 1947 and not before the Civil Court. It was further contended on behalf of the defendant company and its Director in the trial court that the Plaintiff was liable to be transferred from one job to another or from one Section or department to another in the interest of production, or efficiency of the establishment, provided such a transfer did not adversely affect his total emoluments or the basic condition of the service as provided in Rule 24 of the Model Standing Orders framed under the Bengal Industrial Employment (Standing Rules) 1946. That apart the defendant-appellant contended in the court below that he was not entitled to any relief in the Civil Court and no injunction order would be passed in his favour in that suit itself. No case of balance of convenience or inconvenience was made out by the plaintiff in his pleadings if he was to go on transfer to Madras City, far less the question of irreparable loss and injury.

3. The learned trial judge as indicated above overruled the contentions of the defendant-appellants and passed the order of injunction restraining the defendant-appellants from giving effect to the impugned order of transfer of the plaintiff to Madras City as a Senior Reporter and further restrained the defendants from interfering with the service of the plaintiff as a Sub-editor in the Calcutta Office during the pendency of the suit.

4. Mr. Ginwalla and Mr. Chowdhury appearing with Mr. Arunabha Ghose learned Advocates on behalf of the appellant placed before us a Supreme Court decision reported in *Jitendra Nath Biswas vs. Empire of India and Ceylon Tea Company and Anr.* reported in All India Reported 1990 S.C. 255 for the proposition that against a wrongful dismissal of an employee, the relief of reinstatement and back wages can only be available under the appropriate forum in the Industrial Disputes Act but such a relief could not be granted by the Civil Court since the provisions of the Industrial Disputes Act impliedly exclude the jurisdiction of the Civil Court as regards such reliefs. Furthermore the suit for declaration that dismissal of the plaintiff from service was bad and void, for back wages and for injunction preventing the employer from giving effect to the order of dismissal, is in substance a suit for the relief of reinstatement and back wages and is, therefore, not maintainable before the Civil Court. The said reported decision also reiterates the legal proposition that a contract of employment for transferable service could not be specifically enforced (except under the Industrial Law) in the Civil Court. He can at best seek relief of damages. In *Puma Chandra Das vs. Warren Industrial Ltd.* reported in 1991 (2) Calcutta High Court Notes 145 - 1992 Labour and Industrial Cases 1326 a Division Bench of our High Court dealt with a case of the Civil Court refusing injunction in a suit filed by the plaintiff workman wherein a prayer was made for temporary injunction commanding the defendant employer to revoke the order of suspension and pay the difference of the salary and allowance with effect from the date of suspension till the date of revocation and also for a mandatory injunction commanding defendant employer to permit the plaintiff to resume his duties. It was held by the Division Bench in the said case that a suit for specific performance of the contract of service is not maintainable where the employment is based only on a contract of service without having any statutory and other restrictions on the employment itself. In the field of contract of service there is a very little scope of judicial review, unless it can be shown that in the matter of contract of service there are some public law doctrine applicable to public servant protecting the public service either on the basis that it is a public office held by the employee concerned or that there is some statutory provisions regulating dismissal. It was further held that the suit against the employer for a mandatory injunction commanding the defendant employer to revoke the order of suspension and pay the difference of allowance with effect from the date of suspension till the date of revocation and also for a mandatory injunction commanding the defendant employer to permit the plaintiff to resume duty would not be maintainable as the plaintiff has no right to move the Court. He has right to move the Court for any relief pending dismissal during the continuance of the disciplinary proceeding and he cannot also stall any domestic enquiry. Mr. Ginwalla further cited

before us a Single Bench decision of the Kerala High Court in Kerala Rubber and Reclaims Ltd. vs. P.S. Sunny reported in 1989 Labour and Industrial Cases 964 in support of a broad proposition of law that if there be a transfer of a workman from one place to another and malafidies, victimisation, unfair labour practices are alleged, the dispute will be covered by Section 25-T and Schedule 5 Item No. 7 of Industrial Disputes Act and civil suit will not be maintainable. Even if the individual workman is unable to get his cause espoused by worker's union it does not mean and imply that the remedies are not provided under the Industrial Disputes Act for the individual concerned. If the Industrial Disputes Act prescribes remedy and also prescribes the condition for availing of that remedy, if the conditions for invoking the remedy cannot be complied with, it does not mean that the Statute has not provided the remedy. The Legislature obviously intended that certain types or rights which have been created by the Statute must be resolved before the forum, only, if such disputes are espoused by a class of workman. We need not go into the facts of the said case which are peculiar to itself.

5. Mr. Saktinath Mukherjee, learned Senior Advocate for the respondent drew our pointed attention to the proviso to Section 16 of the Working Journalists, (Condition of Service) and Miscellaneous Provisions Act, 1955 which clearly envisages that if under any award, agreement, contract of service or otherwise a newspaper employee is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under the Working Journalists (Condition of Service) and Miscellaneous Provisions Act, 1955, the newspaper employee shall continue to be entitled to the more favourable benefits in respect of that matter notwithstanding that he receives benefits in respect of other matters under the said Act. Sub-section (2) of Section 16 also provides that anything contained in the Working Journalists (Condition of Service) and Miscellaneous Provision Act, 1955 shall be construed to preclude any newspaper employee from entering into an agreement with an employer for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under the said Act. It is the case of both the parties that the provisions of Industrial Employment (Standing Orders) Act, 1946 as are enforced shall apply to every newspaper establishment of the present nature and the parties will be governed by the appropriate provisions of Industrial Employment (Standing Orders) Act, 1946. Even though we accept the argument of Mr. Ginwalla that under paragraph 24 of the Model Standing Orders framed under the Bengal Industrial Employment (Standing Orders) Rules, 1946 all workmen may be transferred from one job to another and from one Section or Department to another in the interest of production or efficiency of the establishment, we cannot ignore the provision of Section 16(1) proviso read with Section 16(2) of the Working Journalists (Condition of Service) and Miscellaneous Provisions Act, 1955 that if the service agreement which is applicable to the present petitioner in any manner confers more benefits to him than what are provided in the Model Standing Orders, he would continue to be entitled to such more favourable benefits arising out of the contract. Notwithstanding that he received benefits in respect of other matters under the Working Journalists (Condition of Service) and Miscellaneous Provisions Act, 1955,

Mr. Mukherjee sought to repeal the argument of Mr. Ginwalla to the effect that the order of transfer impugned is not a mere order of transfer simpliciter but it is also an order of promotion and no employee can be forced against his own wishes to accept a promotion unilaterally at the behest of the employer. In the enforcement of the order of promotion, each party has to enter into a fresh terms of employment and it cannot be said that by virtue of superimposition of the order of transfer on him, the plaintiff-respondent has really accepted the transfer or promotion by necessary implication. Mr. Mukherjee further contended before us that if by passing the order of promotion the management has in fact repudiated the original contract with the plaintiff-respondent, his client cannot indeed seek a specific performance of the said contract of service, but then Mr. Ginwalla in his fairness did not accept the said proposition that in the facts and circumstances of the present case it is an out and out repudiation of the original service contract by the management with the employee concerned. That being so, the present case can really be distinguished from the decisions cited by Mr. Ginwalla where employees sought to have reinstatement of their service contract through a suit seeking other remedies as well against the employer concerned.

6. We would direct the learned trial court to decide upon the question of maintainability of the present suit with utmost expedition along with the holding of the trial itself within a period of three months from this date. We would also uphold the order of injunction in so far as it restrains the defendant-appellants from giving effect to the impugned order of transfer of the plaintiff to Madras City as a Senior Reporter but regard being had to the peculiar nature of the present case we cannot sustain the other part of the injunction order restraining the defendant-appellants from interfering with the service of the present plaintiff : Sub-editor in the Calcutta Office during the pendency of the suit. The defendants-appellants are free to take such action against the plaintiff-respondent and they would also be at liberty to effect his transfer in accordance with law within the framework of the restraint order upheld by us. With this direction the learned trial judge is directed to expedite the hearing of the suit on the lines as indicated herein before. The appeal stands allowed in part to the extent indicated above. There will be no order as to costs.

7. Let this order be communicated to the court below immediately. Let a xerox copy of this order be made available to both the parties on their undertaking to apply for a certified copy of the same.

A.K. Dutta

I agree.