(1937) 01 BOM CK 0015

Bombay High Court

Case No: None

Krishnaji Nilkant Pitkar		APPELLANT
	Vs	
Secretary of State		RESPONDENT

Date of Decision: Jan. 11, 1937

Acts Referred:

- Government of India Act, 1915 - Section 30

Citation: AIR 1937 Bom 449 : (1937) 39 BOMLR 807

Hon'ble Judges: Wassoodew, J

Bench: Division Bench

Judgement

Wassoodew, J.

The plaintiff-appellant, who was a goods guard serving at Kalyan in the G.I.P. Railway, instituted this action against the Secretary of State for India in Council essentially to recover Rs. 1,873 as damages for breach of contract to re-employ him implied in the Communique issued under the instructions of the Member of Commerce and Industry, of the Government of India containing the terms of settlement of the dispute then pending between the Railway Administration and its employees. The material facts are these. In the beginning of February 1930, there was a general, strike of Railway employees which was joined by the plaintiff. Soon thereafter there were negotiations between the All-India Railwaymen''s Federation on behalf of the employees and the Member of Commerce and Industry. In those negotiations there was a settlement of the dispute and the terms of that settlement were embodied in a Communique, the substance of which is as follows:

The Railway Administration will not refuse to take back into service any employee merely because he went on strike. Every employee who offers to return to duty on or before 16th March 1930 will be allowed to do so provided that the post he held when he proceeded on strike has not been permanently filled and provided that he was not discharged for other reasons than the strike. A list will be maintainted by the Agent, G.I.P. Railway, of all employees who offer to return to duty within the

prescribed period and who are not able to do so by reason of the fact that the posts held by them have been permanently filled. Each employee whose name is on this list will be offered the first refusal of employment in the same or in a corresponding position to that which he had held when he proceeded on strike, against vacancies which occur in the future on the Great Indian Peninsula Railway, East Indian Railway and North Western Railway. Any employee who declines to accept the offer of employment on the Great Indian Peninsula Railway will be removed from the list. Any employee who declines to accept an offer of employment on the North Western Railway or the East Indian Bail-way will be transferred to a second list and will be offered appointment on the Great Indian Peninsula Railway after all employees on the first list have been offered employment.

2. The plaintiff presented himself for duty before the expiry of the date prescribed in the said Communique, and his name was entered in the waiting list on the plea that his post had been permanently filled during his absence. The plaintiff alleged that he was entitled to be reemployed forthwith in terms of the offer as the plea put forward was false and that as several outsiders were subsequently employed in vacancies that occurred, there was breach of contract entitling him to damages. It may be noted that after this suit was instituted, the plaintiff was re-employed by the Railway Administration as a guard in the C grade. Both the Courts below have held that the plaintiff''s post was permanently filled, and with that finding of fact we cannot interfere in second appeal.

3. The learned trial Judge also found that there was no breach of the terms of the offer inasmuch as the plaintiff was six. teenth in the waiting list, and the Bail-way Administration had filled up fifteen vacancies only. The District Judge in first appeal did not agree with that finding, and, for the reasons given by him he came to the conclusion that seventeen appointments in all were made in contravention of the Communique and that eight others were not shown by the plaintiff as alleged to have been made in contravention of it. But he dismissed the plaintiff''s claim on the ground that there was no contract enforceable against the Secretary of State upon which the plaintiff could sue by reason of the provisions of Section 30, Government of India Act.

4. There can be no doubt that the Communique referred to represented the terms of the offer on behalf of the railway to employ the persons on strike and the proseutation of the plaintiff for duty constituted the acceptance of that offer. Therefore, prima facie, all the ingredients of a completed contract are present in the case.

5. The learned counsel for the appellant has contended, first, that in the absence of a specific plea upon the question of the binding nature of the contract in the written defence of the Secretary of State, there was no justification for entertaining: the objection in first appeal, as the learned-District Judge had done, and, secondly, that as the refusal to employ the plaintiff in terms of the offer constituted breach of

contract as held by the District Judge, the Secretary of State could not take-shelter under the plea that the prerogative of the Crown relating to contracts of service protected his act in question, for, according to the learned counsel, that prerogative is not absolute and in the present case limited by the rules framed by the Railway Board in virtue of the powers conferred on it u/s 2, Railway Board Act 4 of 1905, for the purposes of Section 47, Railways Act.

6. In support of his first contention the learned counsel has relied upon the decision in Secretary of State v. Yadavgir AIR 1936 Bom. 19 wherein this Court refused to consider the point based upon Section 30, Government of India Act, which was raised for the first time in the Court of Appeal, in the absence of any definite pleading relating to the binding nature of the contract in question. Section 30(1)(2), Government of India Act provides, that every contract made on behalf and in the name of the Secretary of State in Council shall be executed by such person and in such manner as th& Governor. General in Council by resolution directs or authorizes, and, if so executed may be enforced by or against the Secretary of State in Council. The absence of such a contract could legitimately have been pleaded in defence. The learned Advocate-General has argued that proper plea has been raised which was not the case in Secretary of State v. Yadavgir AIR 1936 Bom. 19. According to the plead jigs the plaintiff in that case had alleged a definite agreement or compromise between himself and the Agent of the Secretary of state. The latter in the written defence had admitted that agreement and raised-no question therein or at the trial as to its legality or binding force. It has always been regarded as a healthy rule of practice that a party can succeed only upon a definite plea set up in defence or in the plaint. But every variance between pleading and proof is not always fatal. The test is whether the other party would be taken by surprise if relief were granted on the basia of the new point raised: see Ananda Chandra v. Broja Lal Singh AIR 1923 Cal. 142. The application of the rule has to be considered in connexion with the other circumstances of the case. Courts have in some cases allowed questions of law affecting the validity of the decree to be raised for the first time in appeal on the supposition that the question could be raised upon the substance of the pleadings. Making allowance for the fact that the pleadings in the muff asil are inartistically drawn up, that fact does not warrant the departure from the rule that a plaintiff must be held to the state of facts and equities alleged and pleaded by him or involved in or consistent therewith. That rule applies with equal ''force to the defendant. The following observations in Nathu Piraji v. Umedmal Gadumal (1908) 33 Bom. 35 are important:

A litigating party can only succeed secundum allegata et probata, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of Appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never notice during the hearing

of the suit.

7. That was a suit to obtain possession of certain land on the basis that it was the ancestral property of the plaintiff. The written statement never contested the ownership of the plaintiff and the defence was based upon adverse possession. The question of title was for the first time raised in appeal which was not allowed to be done because it was not taken when it might have been taken in defence.

8. The present case is distinguishable on facts. The plaintiff alleged a definite con tract which he said was enforceable against the Secretary of State. In the written statement, Ex. 10, with reference to that part of the plaint it was pleaded as follows:

The defendant denies that the plaintiff ever had any legal right to be reinstated because of the Government Communique and further that the defendant had ever agreed to reinstate him un conditionally or that the Communique of 1st March 1930 gave plaintiff any legal claim of suit against the defendant or that any damage was caused to the plaintiff by any act of the defendant as alleged in the plaint.

9. There is no reference expressly to the provisions of Section 30, Government of India Act; but by necessary implication the defendant questioned the legality of the contract which was sought to be. enforced against him. The rule of pleadings con. tained in Order 6, Rule 8, Civil P.C., relating to contracts is to the following effect:

Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

10. Here, there being an express denial of the legality or sufficiency in law of the contract, there is in substance a plea not inconsistent with the point raised in appeal. There is no reason therefore why this case should be dealt with on the analogy in Secretary of State v. Yadavgir AIR 1936 Bom. 19.

11. We think the learned District Judge properly dealt with the question as to whether the contract was affected by the provisions of Section 30, Government of India Act. The provisions of Section 30 to which I have already referred are mandatory and must be strictly complied with in order to constitute a valid contract which could be enforced against the Secretary of State. According to the provisions of the law and the rules in force, the contract must be by a deed executed on behalf of the Secretary of State and in his name by the pro. per authority: see Secretary of State v. Yadavgir AIR 1936 Bom. 19; Municipal Corporation of Bombay v. Secretary of State AIR 1934 Bom. 277 and Municipal Corporation of Bombay v. Secretary of State (1904) 29 Bom. 580. The provisions of Section 30, Government of India Act in the view we take are a complete answer to the plaintiff''s claim, in the absence of a contract in writing executed in proper form.

12. But apart from that point it seems to us that there is no good reason for sustaining the claim on the basis of breach of contract, assuming that the offer contained in the Communique and its acceptance by return to duty constitutes a binding contract. It cannot be denied that the Secretary of State in this matter represents the Crown. The G.I.P. Railway is a state-owned railway and is represented by the defendant, the Secretary of State. The Government of India Act, 1919, Section 96-B(1) provides that:

Subject to the provisions of this Act and of rules made thereunder every person in the civil service of the Crown in India holds office during His Majesty''s pleasure.

Therefore the plaintiff as a servant of the Crown would, if serving in the railway, be liable to be dismissed at the will and pleasure of the Sovereign, notwithstanding a contract to the contrary, unless the Crown has deprived itself of its prerogative in some way expressly recognized by law. Upon the authorities such as Dunn v. Queen (1896) 1 Q.B 116, Shenton v. Smith (1895) A.C. 229 and Grant v. Secy of State (1877) 2 C.P.D. 445 Halsbury in his Laws of England (Vol. VI, Edn. 2, p. 608, para. 782) has based the following statement:

Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown, and all in general are subject to dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a special contract be proved.

13. The legal position was examined at great length in Secretary of State v. Yadavgir AIR 1936 Bom. 19 and numerous authorities were considered. The legal position is therefore clear.

14. The question is whether it would make any difference in that position, first, because this is not strictly a case of dismissal of an employee already in service, but a refusal to employ a person to whom employment has been offered, and secondly because of the rules said to have been framed by the Railway Board dealing with the conduct of railway servants and regulating the management of the State owned railway, which have been brought to our notice for the first time in this appeal. In my opinion the power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. If the former can DO claimed as one of the prerogatives of the Sovereign, it is logical to assume that a similar protection can be claimed for breach of an agreement to employ, for, the prerogative can be effeotivly set up immediately upon acceptance of the offer of employment. It cannot be denied that dismissal without notice is tantamount to summary determination of the contract. It is difficult to distinguish that privilege to terminate a contract of service at will from the refusal to accept service, for the latter involves in equal degree a summary determination of the contract. The pleasure of the Sovereign if unrestricted by statute can be expressed at any stage of the contract. The question seems to have been considered in Secretary of State v.

Yadavgir AIR 1936 Bom. 19 where my learned brother Broomfield, J. has dealt with it as follows (p. 118):

He has argued firstly that the oases cited are oases of wrongful dismissal, and his client he says is not claiming damages for wrongful dismissal but for the breach of the contract of re-employment. In my opinion, however, the case cannot be distinguished in principle from the one which would have arisen if the plaintiff had been dismissed on the date when he says he should have been re-employed. In fact legally the action for wrongful dismissal is an action for breach of the contract to employ.

15. It is difficult to resist the force of that" reasoning. In regard to the supposed limitation of the prerogative, assuming that the rules relied upon are referable to the powers of the Railway Board u/s 2 of Railway Board Act, and therefore are in consonance with the provisions of Section 47 of Railways Act, it is clear that there is no limitation whatsoever in those rules in regard to the power of the Sovereign to refuse to carry out his offer of employment. Those rules are intended primarily for the conduct of railway servants already in employment. And moreover, there is an express reservation of the power of the Railway Administration to discharge a railway servant without assigning any reason. That reservation is thus expressed:

Accordingly the power which the railway ad" ministration possess of discharging railway servants without assigning reasons in accordance with the terms of their agreement, or otherwise on reduction of establishment due to fluctuations of traffic, simplification of the methods of work or any other cause, or on grounds of inefficiency must be retained.

16. Therefore, apart from curtailing or limiting the power of the Crown to dismiss ''without notice, the rules referred to acknowledge and retain that power for the effective administration of the railway. We therefore think that the plaintiff has failed to establish his claim to damages and his appeal must therefore be dismissed with costs. No order on cross-objections. Civil Application No. 1018 of 1933 is dismissed with costs.