

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **I.A. No.1167/2007 in CS(OS) No.2128/2006**

% **Judgment Reserved on: 24.07.2007**

Judgment delivered on: 04.03.2008

Mr. V.K. Sayal Plaintiff
Through: Mr. Sujoy Kumar, Advocate
versus

Bharat Heavy Electrical Ltd.(BHEL) & Ors. Defendants
Through: Mr.J.C. Seth with Mr. Mohd.
Rashid, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

1. The defendant has filed this application under Order 7 Rule 11 CPC for rejection of the plaint primarily on two grounds. The first is that the suit is barred by law of limitation and the second is that the suit is barred by the principles of *res-judicata*. The reliefs prayed in the suit are as follows:

“(a) Pass a decree of declaration declaring:

(i) the impugned orders dated 6.7.2001 and 18.9.2001 passed by the disciplinary authority and the appellate authority respectively of the defendant No. 1, as also the related inquiry proceedings relating to memo dated 28.9.2000 regarding dismissal of the plaintiff from service as illegal, arbitrary, mala fide, void, invalid and nonest abinitio being motivated and actuated by mala fides only to deprive and reject the voluntary retirement application of the plaintiff and that the plaintiff should be deemed to be in service of the defendant No. 1 till the date of his superannuation.

(ii) the order dated 28.8.2000 passed by the defendant Nos. 1 and 6 rejecting the voluntary retirement application of the plaintiff as illegal, arbitrary, mala fide, invalid, void and nonest abinitio only to victimize and harass the plaintiff and with a view to illegally and wrongfully dismiss the plaintiff from service,

(iii) that sub-Rule (6) of Rule 25 of the BHEL Conduct and Appeal Rules to the extent they deprive the delinquent of his right to be represented by a legal practitioner and/or a defence counsel of his own choice as illegal, arbitrary, unjust, unfair, unreasonable and ultra vires and constitutional and violative of Article 14 and 21 of the Constitution of India.

(iv) the denial of legal practitioner and/or defence counsel by the defendants to the plaintiff of the own choice of the plaintiff in the inquiry proceedings relating to memo dated 28.9.2000 as illegal, arbitrary, mala fide, invalid, void and nonest abinitio.

b) Grant such other or further relief in favour of the plaintiff and against the defendants as this Hon'ble Court may deem fit, just and proper."

2. According to the plaintiff, he was employed with the

Defendant No.1 vide recruitment letter dated 8.7.1975 initially as Senior Engineer (Material Management). He was promoted to the post of DGM (Administration) w.e.f. 25.6.1991. The plaintiff applied for voluntary retirement in the year 2000 while in the service of the defendant. This application was rejected on 28th August 2000 on the ground that disciplinary proceedings for absence without leave were contemplated against the plaintiff. The plaintiff preferred Civil Writ Petition No.5359/2000 to challenge the rejection his application for voluntary retirement. On 14th September 2000, the court while entertaining the aforesaid Writ Petition passed an order, inter-alia, observing *“any action in the direction of holding departmental inquiry by the Respondent shall be without prejudice to the rights and contention of the parties in the Writ Petition.”* Eventually, the Writ Petition was dismissed by a detailed judgment by a learned Single Judge of this Court 4th May 2001. The plaintiff preferred an LPA bearing No.289/2001. The said appeal came up before the Hon'ble Division Bench on 11th June 2001. While issuing notice in the LPA, the court, inter alia, observed *“In the meantime, any action taken by the Respondent in the departmental proceedings adjudicated against the appellants, will be subject to further orders in the application. Dasti.”* Ultimately, the aforesaid LPA was dismissed by the Hon'ble Division Bench on 9th December 2004 as having become infructuous. The SLP against the order in LPA, preferred by the plaintiff herein was

also dismissed by the Hon'ble Supreme Court on 7th July 2006.

3. Learned Counsel for the applicant/Defendant submits that the cause of action for challenging the order passed by disciplinary authority as well as appellate authority dismissing the departmental appeal first accrued on 6.7.2001 and 18.09.2001 respectively when the said orders were passed. The suit has been filed only in the year 2006. Period of limitation for filing a suit seeking relief of declaration under Article 58 to the schedule of the Limitation Act is 3 years and the time begins to run when the right to sue first accrues. It is contended that the right of sue first accrued when the aforesaid orders were passed. Similarly, the order rejecting the application for voluntary retirement was passed on 28.08.2000 and the same could have been challenged within a period of 3 years from the date of passing of the said order since the right to sue in respect of the said order first accrued on 28.08.2000. Even if the case is treated as covered by the residuary of Article 113 of the Schedule to the Limitation Act, the period of limitation prescribed is 3 years, and the time begins to run when the right to sue accrues. The right to sue accrued in respect of the order or dismissal and the appellate orders when they were passed, since they were given effect to immediately upon their being passed. Similarly, the order rejecting the application seeking voluntary retirement was given effect immediately on it being passed, since the plaintiff was continued to be treated as in

service and was not relieved from his services. It is further argued that the challenge to the rejection of the application for voluntary retirement has been adjudicated on merits by the writ court and consequently that decision would operate as *res judicata* so far as second relief, as prayed in the suit, is concerned.

4. On the other hand, learned Counsel for the Plaintiff submits that a perusal of the aforesaid orders in the Writ Petition as well as in the LPA would show that the holding of the departmental inquiry proceedings was directed to be without prejudice to the rights and contentions in the writ petition and, the action taken in the departmental proceedings were subject to further orders in LPA. Had the plaintiff succeeded in the writ petition or the LPA, or before the Hon'ble Supreme Court, the result would have been that the plaintiff would have been taken to have voluntarily retired from service even prior to initiation of departmental proceedings in question. Consequently, the plaintiff was justified in not initiating any legal proceedings to challenge his dismissal from service on 6th July, 2001, as well as the dismissal on his departmental appeal on 18th September, 2001. It is argued that the plaintiff was entitled to await the outcome of the challenge to the rejection of the application for voluntary retirement, before embarking on a challenge to the order of dismissal from service and the appellate order. It is further argued that the rejection of the plaintiff's LPA and SLP *in limini* and without

consideration of the claim of the plaintiff on merits would not operate and *res-judicata* since the same could not be said to be decisions on merits. He submits that merely because the Writ Petition was dismissed on merits by the learned single judge, it makes no difference, since an appeal is continuation of an original action and the original order merges in the appellate order. Counsel for the Plaintiff also relied on two decisions of Hon'ble Supreme Court reported as **Ramesh B. Desai & Ors. vs. Bipin Vadilal Mehta & Ors.**, (2005) 5 SCC 638 and **Balasaria Construction (P) Ltd. vs. Hanuman Seva Trust & Ors.**, (2006) 5 SCC 658 to contend that the plaint could not have been rejected under Order VII Rule 11(d), CPC on the ground of the suit being barred by limitation, since the question of limitation is a mixed question of law and fact, unless it becomes apparent from the reading of the plaint, on the principle of demurrer, that the same is barred by limitation.

5. Learned Counsel for the applicant/Defendant drew my attention to Section 11 of CPC read with explanation 2 to contend that merely because the LPA and SLP were not decided on merits, this court could not sit in judgment over the decision on merits rendered by the learned Single Judge in Writ Petition (C) No. 5359/2000 and that the bar under Section 11 CPC would apply. He also submits that under Section 3 of the Limitation, it is the duty of the court to reject the plaint in case it is found to be barred by limitation.

6. Having considered the rival submissions, I now proceed to first consider whether the first relief sought by the plaintiff pertaining to the order of dismissal and the appellate order dated 6.7.2001 and 18.9.2001 respectively arising out of the memorandum dated 28.9.2000, can be said to be barred by limitation at this stage.

7. Normally, the question of limitation is a mixed question of fact and law and therefore, cannot be decided at the preliminary or pre-trial stage. However, where there is no dispute on the material facts the Court can proceed to examine the issue on the basis of the facts disclosed in the plaint and the documents filed by the plaintiff. In this case, there is no dispute with regard to the facts relevant to decide the issue of limitation. The aforesaid judgments in **Ramesh B.Desai**(supra) and **Balsaria**(supra) do not advance the case of the plaintiff.

8. As noticed hereinabove, in the proceedings challenging the rejection of the plaintiff's application for voluntary retirement, the writ court passed an order observing that any action in the direction of holding a departmental enquiry by the respondents (the defendants) shall be without prejudice to the rights and contentions of the parties in the writ petition. The meaning and effect of this order, as I understand, was that irrespective of whatever be the consequences of the disciplinary enquiry proceeding, the same shall

have no bearing on the decision of the question whether the application seeking voluntary retirement by the petitioner (plaintiff) was rightly rejected or not. The effect of the petitioner succeeding in the writ petition would have been that the order impugned, whereby the request for seeking voluntary retirement was rejected on 28.8.2000, would have been set aside and the necessary consequence would have been that the petitioner (plaintiff) would have been deemed to have retired even before the initiation of the disciplinary proceedings. Consequently, had the petitioner succeeded in his aforesaid writ petition the need to challenge the disciplinary proceedings would not have survived.

9. Similarly, the Division Bench while passing the order dated 11.6.2001, observed that any action taken by the respondent (defendant herein) in the departmental proceedings adjudicated against the appellant (plaintiff herein) will be subject to further orders in the application for interim relief. Once again, the effect of the Letters Patent Appeal being allowed, had the same been allowed, would have been that the petitioner (plaintiff herein) would have been deemed to have voluntarily retired even prior to issuance of the charge memo dated 28.9.2000. The argument of the plaintiff appears to be attractive on first blush.

10. But, the aforesaid are not relevant considerations to

decide the question of limitation in the present case. The fact of the matter is that when the order of dismissal and the appellate order were passed, they were capable of being challenged by the plaintiff by either initiating independent civil proceedings or by amending the pending writ petition being civil writ petition No.5359/2000. The right to sue in respect of these orders first accrued when they were passed. By not challenging the said orders at the relevant time, the plaintiff gave up his rights to challenge these orders on any of the grounds available in law, and took his chance of sailing or sinking qua the said orders depending on the outcome of the aforesaid Civil Writ Petition No.5359/2000 and LPA No.289/2001.

11. Section 14 of the Limitation Act provides that in computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant, shall be excluded, ***where the proceeding relates to the same matter in issue*** and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of action of a like nature, is unable to entertain it. Consequently, to be able to avail of the benefit of Section 14 of the Limitation Act, it is necessary that the earlier civil proceeding relate to the same matter in issue, and that the earlier proceedings are not entertained by the Court on account of a defect of jurisdiction or other

cause of a like nature. In the present case it cannot be said that the subject matter or the cause of action in issue in the aforesaid writ petition and LPA were the same, inasmuch as, the earlier writ petition pertained to the challenge to the rejection of the plaintiff's application seeking voluntary retirement whereas the first relief claimed in this suit is in relation to the dismissal from service and the appellate order. In fact, when the said writ petition was filed, the cause of action for challenging the order of dismissal of the appellate order had not even arisen since these orders came to be passed after the filing of the writ petition. Moreover, the aforesaid writ petition, LPA and the special leave petition were rejected by the Courts not on account of any defect of jurisdiction or other cause of like nature. The writ petition was dismissed on merits, the LPA was dismissed as infructuous and the SLP against the dismissal of the LPA was dismissed in limine.

12. It is well settled that once the time begins to run after the cause of action has arisen, no subsequent disability or inability to institute a suit stops it except in special cases (see Section 9 of the Limitation Act). A suit seeking a declaration in respect of an order of dismissal would fall under Article 58 [(AIR 1968 Punjab 485)] as well as Article 113 [(1998) 9 SCC 696] of the Schedule to the Limitation Act. Looked at from either point of view, the right to sue accrued in favour of the plaintiff in respect of the order of dismissal and the

appellate order when these orders were passed and enforced. [See (AIR 1968 Punjab 485) and (1998) 9 SCC 696]. Undisputedly, these orders were passed and enforced in July and September 2001, respectively.

13. What is important to be noted is that the plaintiff was in fact interested in discontinuing his services voluntarily and was not interested in the continuation of his services. This is evident from the fact that he had challenged the rejection of his application seeking voluntary retirement and chose not to challenge the order of dismissal and the appellate order which put an end to his services with the defendant.

14. It cannot be said that the plaintiff was reeling under the impression that the challenge to the rejection of his voluntary retirement application was understood by him as a challenge to his dismissal from services on disciplinary grounds. It has been held in (1996) 6 SCC 100 that proceedings under Article 226 of the Constitution are civil proceedings for the purposes of Section 14 of the Limitation Act. It has been held in 1992 (46) DLT SN 3 that the suit for declaration in respect of an order of compulsory retirement/dismissal can be filed within a period of 3 years from the date of the order passed in appeal i.e. when the same attains finality. In (1997) 11 SCC 305, the Supreme Court has held that such an order

could be challenged within the period of limitation from the date when the order becomes effective. As aforesaid in the present case, the disciplinary orders and the appellate orders passed in the year 2001 became effective soon after their being passed. For the aforesaid reasons, the first relief of declaration to challenge the order of dismissal and the appellate order dated 06.07.2001 and 18.09.2001, respectively, clearly appear to be barred by limitation (see ILR 1969 Delhi 487).

15. The mere fact that the consequence of the plaintiff succeeding in his aforesaid writ petition or LPA or SLP would have been that he would have been deemed to have been voluntarily retired even prior to initiation of departmental proceedings, and there would have been no question of any departmental action or order against him does not tantamount to a challenge by the plaintiff to the orders or dismissal and the appellate order by him. It is only now in the present suit that the plaintiff is seeking to challenge these orders on grounds which are for the first time being set up and which are independent of his grievance that his application for seeking voluntary retirement has been wrongly rejected. The plaintiff took a gamble. He put all his eggs in one basket. He chose not to challenge the orders of dismissal and the appellate order and put everything at stake by solely depending on his writ petition, LPA and SLP challenging the refusal of his application seeking voluntary

retirement. He must, unfortunately, now take the consequences of his acts and omissions.

16. Coming to the second relief prayed for by the plaintiff pertaining to the rejection of the plaintiff's application for voluntary retirement, it appears that the submission of the defendant that the same is barred by *res judicata* is correct. Undoubtedly, the issue with regard to the rejection of the application seeking voluntary retirement has been adjudicated upon in WP(C) No.5359/2000 by a detailed decision on merits. Merely because the appellate order and the order passed by the Hon'ble Supreme Court dismissing the SLP *in limine* did not go into the merits, the decision on merits rendered by learned single Judge of this Court does not get washed away and in my view the same would operate as *res judicata* between the parties. In paragraph 11 of the said decision of this Court in WP(C) No.5359/2000 the finding as recorded by this Court is as follows:

“11. A discretion is vested on the respondent-company to refuse the benefit of the scheme to an employee. In the present case it cannot be said that the said discretion has been exercised by the competent authority arbitrarily. It also cannot be said that the respondent No.2 failed to act reasonably and fairly in the present case. The case of the petitioner was considered in the light of the facts and his conduct and on such consideration his request to go on voluntary retirement was rejected. I find no infirmity in the action of the respondents in rejecting the application of the petitioner to go on voluntary retirement.”

17. Learned counsel for the defendant has relied on **Y.B.**

Patil and Ors. vs. Y.L. Patil, AIR 1977 SC 392 wherein the Supreme Court has held that once an order made in the course of proceedings becomes final it would be binding at the subsequent stage of that proceeding. Where an order passed by the High Court had become final on account of its not being challenged, the same would operate as *res judicata* and would be binding at the subsequent stage of the same proceedings. Counsel for the defendant submits that merely because the decision of the learned single Judge in the aforesaid writ petition was challenged, first before the Division Bench and thereafter before the Supreme Court, both of which failed, the position of the plaintiff vis-a-vis the judgment in WP(C) No.5359/2000 could not be better off than it would have been had the plaintiff not challenged the order of the learned single Judge at all. I find force in this submission of the defendant.

18. So far as the challenge to sub-rule 6 of Rule 25 of the BHEL Conduct and Appeal Rules is concerned (which is covered by the third and the fourth reliefs prayed in the suit), the said relief is merely a ground taken in support of this first relief i.e. with regard to the challenge to the dismissal from services in the departmental appeal. Once it is held that the said relief is barred by limitation, the challenge to the conduct and appeal rules cannot be independently sustained and this relief too would be barred by limitation since the cause of action for challenging the said rules first accrued in favour of

the plaintiff upon the passing of the order of dismissal and the appellate order in the year 2001.

19. Learned counsel for the defendant has relied on ***Harinarayan Srivastav vs. United Commercial Bank & Anr.***, (1997) 4 SCC 384 wherein the Hon'ble Supreme Court has upheld Rule 19.12 of the bipartite settlement which require permission to be obtained by the delinquent employee to seek the assistance of an advocate in disciplinary proceedings. However, since I am of the view that the suit is barred by limitation and by *res-judicata*, as aforesaid, it is not necessary for me to go into this question.

20. For the aforesaid reasons I allow this application filed by the defendant and reject the plaint. Parties are left to bear their own costs.

(VIPIN SANGHI)
JUDGE

March , 2008
P.K. BABBAR