

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 2188 of 2003 & IA No. 4895/06

Reserved on : August 6, 2009

Date of decision: September 7, 2009

A.N. SHUKUL

..... Plaintiff

Through Mr. Naresh Kaushik with
Mr. Satish Dayanandan and
Ms. Aditi Gupta, Advocates

versus

PHILIPS INDIA & ORS

.... Defendants

Through Ms. Sujata Mehra with
Mr. Hemant Phalpher, Advocate

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. Whether reporters of the local newspapers
be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

JUDGMENT
07.09.2009

S. Muralidhar, J.

1. This suit seeks a declaration that the termination of the services of the Plaintiff by the Defendants was illegal and seeks a consequential mandatory injunction directing the Defendants to pay the Plaintiff damages to the tune of Rs.46,74,655/-.

2. The Plaintiff joined the services of Defendant No.1 Philips India Limited on 26th April 1971 as an Assistant. On 2nd July 1974 he got promoted from Grade EA-3 to EA-4 and on 4th January 1982 to the next Grade EA-5. He was promoted to Management Group-7 on 3rd June 1994. He was ultimately promoted to Management Group-6 on 15th May 1995. According to the Plaintiff he was called by the Branch Head, Defendant No.2 on 2nd August 2002 and informed that he would have to quit the service within the next three months. According to the Plaintiff, “he was shocked and depressed”. He informed the Branch Head that his financial commitments at that stage was such that it would not be possible for him to do so. On 9th September 2003 he was called by the Branch Service Head as well as by the General Manager (Service) to the office situated at Okhla, New Delhi and told that if he did not resign on his own, his services would be terminated unceremoniously and he would not be given any benefits in such eventuality. The Plaintiff alleged that thereafter all work was taken away from him and he was not allowed to discharge his duties. He was made to sit in a corner and while away his time throughout the day resulting in deep humiliation and anxiety. Finally, the Plaintiff served a legal notice dated 14th December 2002 on Defendant No.1 protesting about the impending illegal action being contemplated against him. Soon thereafter on 19th December 2002 the Defendant No.1 issued an order terminating the services of the Plaintiff without assigning any reason. A cheque for the terminal dues was enclosed. It is stated by the Plaintiff that there was an error in this as well

since the terminal dues were calculated on the basis of the basic pay instead of the gross salary thus resulting in a short payment of Rs.88,800/-. A representation dated 9th January 2003 was made by the Plaintiff requesting reinstatement. Thereafter, the present suit was filed for the aforementioned reliefs.

3. In the written statement it is pointed out by Defendant No.1 that the relationship between the Plaintiff and Defendant No.1 was purely contractual and that the Plaintiff's services were terminated in terms of the said contract. There was no cause of action that had arisen in favour of the Plaintiff and against the Defendants. In terms of Clause 3 (c) of the appointment letter dated 26th April 1971 it was stipulated that "either party may terminate your service by giving one months notice or wages/salary in lieu thereof." Clause 5 of the promotion letter dated 3rd June 1994 by which the Plaintiff was promoted to Management Group 6 stated that his services could be terminated "by either party giving the other three months written notice or salary in lieu thereof." It is accordingly stated that after enjoying the benefit of service the Plaintiff cannot not seek to challenge the contract entered into by him. On facts it was submitted that the Defendant Company went through the process of reorganization and reconstruction in keeping with the highly competitive changed economic scenario and rapid changes in electronic technology. In these changed circumstances, the services of the Plaintiff were no longer required. He was informed in August 2002 that he could not be

retained in service and that he would be given pay for three months in lieu of notice in accordance with the terms of employment so that he could make alternate suitable arrangements. It is further pointed out that the Defendant No.1 had taken into account the possible hardship that the Plaintiff might face and he had therefore been an ex gratia amount of Rs.2,50,000 as part of the terminal dues.

4. In his replication the Plaintiff disputed that the Defendant No1 had terminated his services on the basis of a policy since such policy which was never made public. According to the Plaintiff his acceptance of the three months' pay along with dues and ex gratia payment amounting to Rs.6,54,561/- (after deduction to tax) had been under protest as evidenced from his representation dated 9th January 2003. It was reiterated that the termination was illegal and arbitrary. It is further contended that the Plaintiff was discriminated vis-à-vis another employee, Mr. K.B.C. Nair who was permitted to opt for the Voluntary Retirement Scheme ('VRS') declared by the Defendant No.1 purely on medical grounds. Mr.Nair's terminal benefits were calculated on the basis of gross salary and not the basic pay as in the case of the Plaintiff. The plea of down-sizing was denied as Defendant No.1 had advertised for the post on which the Plaintiff was working.

5. On the basis of the above pleadings, this Court on 7th December 2004

framed the following issues:

“1. Whether the termination of services of the Plaintiff by the Defendant is legal and valid? **OPP**

2. Whether there was withdrawal of duties of the Plaintiff and is so whether the withdrawal of duties was illegal, unjustified and sudden? **OPP**

3. Whether the Plaintiff is entitled to a decree for damages as prayed for in the plaint? **OPP**

4. Whether the present suit for declaration and damages is maintainable? **OPD**

5. Whether the Plaintiff is entitled to any damages?
If so, the amount of damages? **OPP**

6 . Relief”

6. The affidavit by way of evidence was filed by the Plaintiff on 4th April 2005 and by the Defendants on 4th October 2005. The Plaintiff filed the further amended affidavit on 10th March 2006. The Plaintiff examined himself as PW 1. The Defendants tendered the evidence of one witness DW 1 Mr.Yashpal Mehndiratta, Deputy Manager, HR of Defendant No.1.

Issue Nos. 1 and 2

7. Both these issues touch upon the validity of the termination of the services of the Plaintiff by the Defendant No.1. The fact of the Plaintiff

having being appointed on 26th April 1971 and having been periodically promoted till the post of Management Group 6 is not in dispute. At the time of termination of his services the Plaintiff was working at the post of Management Group 6. The letter dated 15th May 1995 by which promotion was granted to that post has been marked as Ex.P-7. While informing the Plaintiff of his revised pay and benefits, it was stated therein that “other benefits which you are presently entitled to, will continue.” The Plaintiff’s salary was further revised on 1st April 1999, 25th April 2000, 6th April 2001 and 1st April 2002.

8. Considering the fact that there was no change in the terms and conditions, those contained in the letter dated 3rd June 1994 by which the Plaintiff was promoted to Management Group 7 are relevant. Clause 5 of the said letter stated that “your services may be terminated by either party giving the other three months written notice or salary in lieu”. It was submitted by learned counsel for the Plaintiff that the termination was stigmatic since at that age and stage the Plaintiff would be unable to get another employment. He submitted that Mr. Nair was offered retirement under the VRS and paid terminal dues on the basis of his gross salary whereas the Plaintiff was discriminated against by being summarily removed from his services.

9. It was urged that the terminal clause in the appointment letter has to be understood in the context of the immediate preceding clause 4 which

talks of retirement For easy convenience Clauses 4 and 5 are reproduced as under:

“4. The age of superannuation from the Company’s service normally is 60 years provided, however, the Company shall have absolute discretion to retire you at any time without assigning any reason after your attain the age of 58 years and for the purpose of determining this, the age recorded with the company at the time of appointment shall be considered as final and conclusive.

5. Your services may be terminated by either party giving the other three months written notice or salary in lieu.”

10. It is submitted that this Court in *Avineshwar Sawhney v. JK Industries Limited* 152 (2008) DLT 712 (DB) in similar circumstances set aside the termination on the ground that subjective satisfaction of the employer for terminating the services of the employee was not sufficient. Such subjective satisfaction had to be an objective consideration. Independent of the above arguments learned counsel for the Plaintiff submits that in view of the judgment of the Supreme Court in *Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly* (1986) 3 SCC 156 Clause 5 would be void in terms of Section 23 of the Indian Contract Act 1872 (‘Act’) and therefore, cannot form the basis of the termination of the services of the Plaintiff. It is submitted that

although the said decision was rendered in the context of a public sector undertaking (PSU), the principles would govern private sector employment as well. It is submitted that if the termination was wrongful then damages should follow.

11. On the other hand it is contended by learned counsel for Defendant No.1 that the terms of the contract were strictly complied with by it and therefore the suit must fail. Reference is made to the judgment in ***Juliana Loiseau v. British High Commission*** to urge that the relief sought in the plaint is incapable of being granted.

12. At the outset it must be noticed that there is no prayer made by the Plaintiff seeking a declaration that Clause 5 of the conditions of service under which the termination has been brought about is void in terms of Section 23 of the Act. In fact no such issue has also been framed. Therefore, ordinarily this Court is not really called upon to determine if Clause 5 is void. Even assuming that such question can be raised at the time of arguments, this Court observes that the reliance upon the judgment in ***Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly*** is misplaced. The very first paragraph of the said judgment sets out the context in which it was rendered. The two issues which the Supreme Court formulated in the said case were:

“1) Whether a Government company as defined in
Section 617 of the Companies Act, 1956, is “the

State” within the meaning of Article 12 of the Constitution?

2) Whether an unconscionable term in a contract of employment is void under Section 23 of the Indian Contract Act, 1872, as being opposed to public policy and, when such a term is contained in a contract of employment entered into with a Government company, is also void as infringing Article 14 of the Constitution in case a Government company is “the State” under Article 12 of the Constitution?”

It is obvious therefore that the aforementioned decision has to be read in the context of employment in the public sector and not in the private sector. This Court has in *Shri R.Sen Gupta v. May and Baker India Limited (decided on 6th February 2009)* also declined to entertain a challenge to a similar clause governing the employment in the private sector. In *Y.K.Sethi v.BASF India Ltd. 2009 VI AD (Del) 605*, this Court held that in the absence of the Plaintiff laying factual foundation, the Court cannot examine the question of invalidity of a clause in the contract. Here too no such factual foundation has been laid.

13. In *Avineshwar Sawhney v. JK Industries Limited*, the evidence led revealed that the termination was account of the management losing confidence in the employee and in his capacity to discharge his duties. Further the employee there was held to have been inefficient as a Production Manager since he could not improve the quality and

productivity. The trial Judge had accepted the statement of the witness of the Management to this effect. The Division Bench in those circumstances observed that “mere statement of the witness of the respondent is treated as gospel truth by the learned Single Judge with the remarks that it was the ‘subjective satisfaction’ of the respondent. Such subjective satisfaction had to be on objective considerations.” It was further observed that in view of the stand taken by the employer about the quality of the production of the employee, “the burden lay on the respondent to place on record necessary material to show that the quality as well as quantity of production had gone down during the period when the appellant was in charge of the production on the basis of which opinion was formed that he had become ineffective as Production Manager. Mere *ipse dixit* of the respondent in this behalf would not suffice.” It was in those circumstances that the termination was held to be bad in law.

14. In the considered view of this Court the facts of the present case are entirely different. The termination in the instant case cannot be viewed as being stigmatic. The letter dated 19th December 2002 terminating the services of the Plaintiff reads as under:

“This is to advise you that the Management has decided to terminate your service with effect from the close of business hours on 19th December 2002 and after this date and time, you will cease to be an employee of the Company. However, under the

name of employment, you will be paid a sum equivalent to 3 month's salary in lieu of notice.

By a copy of this letter, we are advising Salaries Department to settle your dues as per the following details. Enclosed Annexure -1 specifies payment of "long term benefits" and "guidelines to settlement of dues"

30 days monthly salary for December 2002

3 months' salary including monthly allowances

One time ex-gratia of Rs.2,50,000 subject to tax
Basic salary for 256 days in lieu of PL accumulations."

15. In the written statement it has been explained that the said decision was taken on account of the reorganisation and reconstruction that the Defendant No.1 had to undertake on account of the highly competitive changed economic scenario and rapid changes in electronic technology. The Plaintiff was therefore sounded out in August 2002 that he would have to leave. He never objected to the terms and conditions. This is plain from the following reply given by him during the cross-examination:

"The terms and conditions of the documents Ex.P1,P3 to P6 were signed after going through their contents.

I did not make any representation objecting any terms and conditions of documents Ex.P1,P3 to P6 and D6 in writing.

Mrs. Shivani Rao had called me in the office on 2nd August 2002.

After 2-8-2002 I did not make any representation in writing to the management (vol.) Mrs. Shivani Rao spoke to me verbally to leave the company as I had already attained the age of around 53. Thereafter I asked from her as to what is the reason for that, then she replied that she cannot say more as this is the policy of the company.

Since I did not receive anything from management in writing, so I did not make any representation to senior management in writing.

I was called on 9th September 2002 in the office by Mr. N.K. Gupta when I was working in the field where Mr. Sudhir Kohli, Mr. R.P. Singh, General Manager (Personnel) were also present there.

They had asked me on that day to leave the company as this is the policy of the company.

I do not remember exact location as to where I was present at the time of receiving phone call from Mr. N.K. Gupta.

I was looking after the South Delhi market and East Delhi market but I was present in the South Delhi market at that time.

I do not make any representation even after 9th September 2002 in writing as I was conveyed verbally.

I have gone through the plaint as well as replication before signing the same.

From 16-9-02 onwards all my works were withdrawn by Mr. N K Gupta.

I asked Mr. N K Gupta as to why it is being happened to me, he replied that 'whatsoever I had conveyed to you that is as per the instructions of Mr. Sudhir Kohli.

I did not make any representation to Mr. Sudhir Kohli.

I did not ask Mr. Sudhir Kohli, however, I spoke to Mr. R.P. Singh by making phone call on 10th December 2002 to him.

From 1996 onwards there were lot of shuffling in the company but I do not know why.

I was not served with the notice of 3 months period by the defendant company before terminating my services, however, it was all spoken verbally.

It is wrong to suggest that I was given 3 months time in August 2002 to make alternate arrangement for new job informing me that my services are no longer required.

I was served with termination notice dated 19th December 2002 (Ex.No. D7).”

16. The above answers show that the Plaintiff was aware of what was in store. It was not as if the termination happened all of a sudden. If the verbal communication to the Plaintiff on 2nd August 2002 is taken to be a notice issued, then requirement of three months advance notice is clearly

satisfied. In any event it is not in dispute that the Plaintiff did receive the entire benefits as per the calculation of dues together with ex gratia amount of Rs.2.5 lakhs. For the purpose of determining whether the termination was illegal the above facts are sufficient. This is not a case where the Plaintiff was being asked to leave on account of a serious misconduct. The explanation given in the written statement by the Defendant No.1 that dispensing with the services of the Plaintiff became necessary on account of the changed economic scenario cannot be stated to be arbitrary or unreasonable. The case of the Defendant No.1 has been consistent in this regard. The following questions and answers during the cross-examination of the Defendant's witnesses:

“Ques: Can you assign any reason that services of the plaintiff were no longer required at any point of time?”

Ans: Mr. A.N. Shukul was explained verbally by his Branch Manager that because of reorganization of the defendant company, his services would not be required, so he was given some time of approximately three month somewhere in month of September 2002 to look forward another employment.”

17. Learned counsel for the Plaintiff sought to argue that the Defendants were taking inconsistent pleas; sometimes it was stated that the termination of the Plaintiff's services was on account of the reorganization of the defendant company and at some other place it was

stated that his termination on account of downsizing. This submission is without merit. Whatever may be the cause it cannot be said that the reasons for which the Plaintiff's services terminated were either arbitrary or unreasonable. In the facts and circumstances of the present case this Court is not inclined to conclude that the termination of the services of the Plaintiff was not valid and that the withdrawal of duties of the Plaintiff was either illegal or unjustified. The two issues are accordingly answered against the Plaintiff.

Issue Nos. 3,4 and 5

18. While it is possible that a suit seeking damages on account of a wrongful termination can be maintained, on merits the Plaintiff has been unable to prove his case. In view of issues 1 and 2 being answered against the Plaintiff, the question of award of damages does not arise. The issues are answered accordingly.

19. For the aforementioned reasons, this suit is dismissed with costs. The pending application also dismissed.

S. MURALIDHAR, J.

SEPTEMBER 7, 2009
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