

\$~

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

15

+ **W.P.(C) 10185/2009**

SHYAM LAL

..... Petitioner

Through Mr. Amit Kumar, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Through Mr. Neeraj Chaudhari with Mr. Khalid
Arshad, Advocate

CORAM: JUSTICE S. MURALIDHAR

- | | |
|---|----|
| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in Digest? | No |

ORDER
16.09.2010

%

1. The Petitioner is 64 years old. He was appointed as a driver in the Embassy of Greece (Respondent No. 2 herein) in the year 1971 as a locally recruited person. He served Respondent No. 2 for over 34 years and 9 months till September 2005. The Petitioner states that eight months prior to the date of his superannuation, i.e. 31st May 2006, his services were terminated with effect from 1st October 2005 without assigning any reason.

2. The Petitioner made a representation to the Ministry of External Affairs ('MoEA'), Government of India which took up his complaint with the Embassy of Greece. An appeal was also made to the Foreign Minister of

Greece with regard to the Petitioner's allegedly illegal termination and consequential relief of compensation. In response to a legal notice issued by the Petitioner, the plea of Respondent No. 2 in the reply dated 1st June 2006 was that his engagement was on a casual basis and fell outside any of the labour statutes in India. Therefore, his claims were not accepted.

3. The Petitioner then applied to the Government of India under Section 86 of the Code of Civil Procedure Code, 1908 ('CPC') for permission to sue Respondent No. 2 for unlawful termination of his services and for compensation as a consequence thereof. He also sought to sue Respondent No. 2 for the retiral benefits he was entitled to. The prayer in his application filed with Respondent No. 1 reads as under:

“It is, therefore, respectfully prayed that under the circumstances mention above and in the interest of justice the necessary written consent may kindly be granted to the applicant with respect to file a specified suit or to several suits or any other specified class or class specified in the case of any suit for the recovery of his hard earned amount of Rs. 10,80,950/- along with litigation and other charges.”

4. For a long time, the Petitioner did not receive any response. He had to take recourse to the Right to Information Act, 2005 ('RTI Act'). In reply to an application filed by him under the RTI Act, he was informed by Respondent No. 1 on 21st July 2008 that “the matter is under the Ministry's consideration. The Ministry will revert to you as soon as possible.” But thereafter, there was no response. In those circumstances, the Petitioner filed the present petition.

5. In the counter affidavit filed by Respondent No. 1/Union of India ('UOI') on 9th July 2010 it was stated that by a letter dated 8th June 2010, the Government of India had accorded and certified its consent under Section 86 CPC "for institution of legal suit by the Petitioner against the Embassy of Greece, New Delhi in a court of competent jurisdiction for getting his terminal benefits not including the compensation for termination." This Court then required the UOI to file an additional affidavit giving the reasons why the sanction for claim of compensation for termination was not accorded.

6. Pursuant to the above order, the additional affidavit dated 15th September 2010 has been filed by the UOI. It is stated that the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ('UN Convention, 2004'), "reflects the International Practice as to the Immunity from the Jurisdiction of local courts." A reference is made to Article 11 which reads as under:

"1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

a. The employee has been recruited to perform particular functions in the exercise of government authority;

b. the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) A member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference or

(iv) any other person enjoying diplomatic immunity;

c. the subject matter of the proceeding is the recruitment, renewal or reinstatement of an individual;

d. the subject matter of the proceeding is the dismissal or termination of employment of an individual....”

7. Learned counsel for Respondent No. 1 referred to para 6 of the additional affidavit to state that there is an international practice to grant immunity to foreign missions in terms of Article 11 (2)(d) of the UN Convention, 2004 where the proposed legal action was in relation to dismissal or termination of the employment of an individual as regards claim for compensation. In addition, he referred to a Model Code of Contract whereby locals are employed in the embassies in India. According to him, the Model Contract only envisages the payment of retiral benefits. Further, the understanding of the UOI is that Article 11 (2) (d) is an exception to Article 11 (1) and that since the proposed litigation concerns claims for compensation for alleged illegal dismissal or termination of the employment, as a matter of practice no sanction can be granted for that purpose.

8. Having considered the submissions of learned counsel for the parties and having perused the records, and in particular the UN Convention, 2004, this Court is of the view that the UOI has proceeded on an incorrect understanding of Article 11 (2) (d) of the UN Convention, 2004. In terms of

Article 11 (1), in order to constitute an exception to Article 11 (1) two conditionalities have to be satisfied. One is that the subject matter of the proceeding should concern the dismissal or termination of the employment of an individual. That condition is satisfied in this case. The second conditionality, which is a cumulative one as indicated by the word ‘and’, is that the “Head of the State, the Head of the Government or the Minister for Foreign Affairs of the employer State” should determine that “such a proceeding would interfere with the security interests of that State.”

9. When a query was posed by this Court to the learned counsel for Respondent No. 1, whether UOI had ascertained from Respondent No. 2 whether there was any such determination by Respondent No. 2 that the proceeding proposed to be instituted by the Petitioner would interfere with the security interests of the Government of Greece, learned counsel for Respondent No. 1 answered in the negative. Clearly, the UOI was on its own presuming that the proceedings proposed to be instituted by the Petitioner would interfere with the security interests of the Government of Greece.

10. At this stage, learned counsel for Respondent No. 1 interjects to submit that it is the understanding of the UOI that all foreign missions are immune from claims of compensation by the local employees of such foreign missions who allege illegal dismissal or termination of services. When asked to explain the basis of such understanding a reference is made again to the international practice of granting immunity under Article 11 of the UN Convention, 2004.

11. In the considered view of this Court, Article 11 of the UN Convention, 2004 does not give any such blanket immunity to a foreign embassy from claims for compensation by a local employee who alleges illegal termination of his services. Immunity can be granted in terms of Article 11 (2) (d) only where such foreign government determines that such proceeding would interfere with its security interests. In the present case, there is no determination as yet by the Government of Greece that the proceedings proposed to be instituted by the Petitioner seeking compensation for alleged illegal termination of his services would interfere with the security interests.

12. Consequently, there is no legal basis for the UOI to refuse sanction to the Petitioner to sue Respondent No. 2 to seek compensation for alleged illegal termination of his services. Consequently, the decision dated 8th June 2010 of the MoEA refusing sanction to the Petitioner to seek compensation from Respondent No. 2 is hereby set aside.

13. The next question that arises for consideration is the consequential direction that should be issued. Learned counsel for Respondent No. 1 refers to the judgment of the Supreme Court in *Union of India v. Bilash Chand Jain (2009) 16 SCC 601* which holds that even where the High Court finds that refusal of sanction by the UOI under Section 86 CPC is not valid, the High Court has to remand the matter to MoEA “to reconsider the matter in accordance with law instead of itself directing the Government to consent order under Section 86 (3).”

14. Consequently, in terms of the judgment of the Supreme Court in *Union*

of India v. Bilash Chand Jain, this Court remands the matter to Respondent No. 1 to reconsider the request of the Petitioner for grant of sanction to claim compensation from Respondent No. 2. A fresh decision on the Petitioner's request to the above extent will be taken by Respondent No. 1 within a period of eight weeks from today. The said decision will be communicated to the Petitioner within a further period of two weeks thereafter. If aggrieved, it will be open to the Petitioner to seek such appropriate remedies as are available to the Petitioner in law.

15. The petition is, accordingly, allowed with the above directions.

16. Order be given dasti under the signature of the Court Master.

S.MURALIDHAR, J

SEPTEMBER 16, 2010

rk