

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

+ **RFA No. 195/2004**

% **24th April, 2012**

V.S. SAINI AND ANR. Appellants
Through : Mr. Shraman Sinha and Mr.Bhimraj,
Advocates.

versus

D.C.M. LTD. Respondent
Through : Mr. Harvinder Singh, Ms. Megha Gaur
and Ms. Vidhi Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. The present appeal reflects the gross arm twisting tactics which are resorted to by big companies in this country and against small employees. Before proceeding to hear arguments in the matter, an endeavour was made to see that the matter is resolved out of Court, inasmuch as, the respondent was also having litigations with respect to its other employees, but the Legal

Manager of the respondent-company appeared yesterday and stated that no out of Court settlement could be arrived at. I have, therefore, proceeded to hear counsel for the parties on merits and am proceeding to dispose of this appeal.

2. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 20.10.1998 rejecting the leave to defend application filed by the appellants/defendants in a suit for recovery of ₹1,25,000/- alongwith interest @24% per annum under Order 37 CPC.

3. The facts of the case are that appellant No.1/defendant No.1 was employed by the respondent as a Technician. The appellant No. 1 was sent by the respondent-company for training to Germany. Before being sent for training the appellant No.1 entered into an agreement dated 20.4.1995 with the respondent agreeing to pay a sum of ₹5,00,000/- to the respondent/plaintiff if the appellant No.1 left the services of the respondent before 5 years after rejoining. There is an issue of only proportionate payment in terms of the agreement and not the complete amount of ₹5,00,000/-, and which issue will be dealt with by me hereinafter. The respondent/plaintiff in addition to getting the agreement signed from appellant No.1, also took a surety bond from appellant No.2, who is the father of

appellant No.1. This surety bond is also dated 20.4.1995. The agreement was attested by the notary public subsequently on 21.4.1995. After coming back from Germany the appellant No.1, after serving the respondent-company for roughly about thirteen months, tendered his resignation for relieving him with effect from 31.8.1996. Appellant No.1 in an extremely fair manner at the time of resigning, sought to make payment of the proportionate value of the surety bond which was for ₹5,00,000/- for five years by seeking to make payment for the period for which he did not serve the respondent-company. Appellant No.1 wrote two communications dated 28.8.1996 and 3.9.1996 which showed certain negotiations with regard to the amount payable to the respondent under the service agreement. Appellant No.1 vide letter dated 3.9.1996, written pursuant to the fax dated 28.8.1996 sent a sum of ₹3,75,000/- by means of different bank drafts which were stated to be arranged from various relatives and which bank drafts were subsequently, without any protest said to have been encashed by the respondent. As per the respondent/plaintiff, since appellant No.1 did not serve the complete terms of five years, it claimed a total amount of ₹5,00,000/- and since only ₹3,75,000/- was paid, subject suit for recovery of ₹1,25,000/- alongwith interest @24% per annum was filed.

4. After service of the summons for judgment in the suit,

appellants/defendants filed their leave to defend application raising the following defences:-

- (i) Courts at Delhi had no territorial jurisdiction as no part of cause of action accrued at Delhi. The agreement and the surety bond in question were executed at Chandigarh /Ropar/Jalandhar, Punjab. Not only that no part of cause of action had accrued in Delhi, also the appellants/defendants were not the residents of Delhi as per the admitted memo of parties in the plaint.
- (ii) The respondent-company had received a sum of ₹3,75,000/- and on encashment of the bank drafts of ₹3,75,000/- there was accord and satisfaction between the parties whereby the appellants/defendants had no liability towards the respondent/plaintiff whose claim under the service agreement and surety bond stood satisfied.
- (iii) Even assuming there was no accord and satisfaction, in terms of Clause 5 of the service agreement, the amount which is payable to the respondent/plaintiff is *pro rata*/proportionate amount for the balance period of service not performed.
- (iv) The amount which is claimed under the surety bond, can only be determined after trial, inasmuch as, liquidated damages, by the nature of contract, cannot be granted under Section 74 of the Contract Act,

1872, inasmuch as, the damages are such which can be calculated.

5. The trial Court has dismissed the application for leave to defend by holding that the Courts at Delhi had territorial jurisdiction because there are clauses in service agreement and the surety bond that the Courts at Delhi will have territorial jurisdiction. So far as the merits of the matter are concerned, the trial Court held, and if I may say so very cryptically, that amount which was claimed by the respondent/plaintiff ought to be paid in terms of service bond. The issue of accord and satisfaction has been dealt with in a very cursory manner, and there is no reference in the impugned judgment to the issue of satisfaction on account of *pro rata*/proportionate payment by the appellants to the respondent/plaintiff. The entire reasoning of the trial Court, so far as merits are concerned, is contained in para 8 of the impugned judgment and which reads as under:-

“8. It has been submitted on behalf of the defts. that although there was agreement interse parties for deposit of Rs.5 lakhs by the deft. no. 1 and to secure the same and to fulfil this obligation, the deft. no. 2 had executed a surety bond, but as per settlement interse parties, a lumpsum amount of Rs.3.75 was accepted by the management of the pltf. which the defts. had paid in full and final settlement by way of bank drafts. There is a total denial to this on behalf of the plaintiff. The defts. have not produced any document on record except a copy of letter annexure A-1, which gives the details regarding the calculations of the payment alleged due to the pltf. for the unserved period. The receipt of this document is not denied by the pltd. but it is pleaded that receipt of such document does not amount to acceptance and that

the pltf. never accepted the payment of Rs.3.75 lakhs in full and final settlement. Herein the facts of the case, I find that there was agreement interse parties regarding the terms of employment of the deft. no. 1 with the pltf. and imparting him training at the expense of the plaintiff and that on completion of training, the obligation of the deft. no. 1 to serve the company for a minimum period of five years and in the event of his failure to fulfil the condition, to pay the company a sum of Rs.5 lakhs as damages and for the fulfillment of this obligations, the deft. no. 2 had executed the surety bond on the same very date. As already discussed above, the execution of the said documents is admitted by the defts. and also the contents thereof. Payment of Rs.3.75 lakhs was also made to the pltf. by the deft. no. 1 because of the fault of not fulfilling the full term of his service with the pltf. There is nothing on record from the side of deft. to suggest or prove that the plaintiff had agreed to the lumpsum payment of Rs.3.75 lakhs instead of Rs.5 lakhs. The defts have not been able to raise any triable issue, in my opinion, as per the discussions made above. The application filed by both the defendants are without any substance and I find no ground to allow the same. Same are hereby dismissed.”

6. Before this Court, learned counsel for the appellants/defendants argued the four points as stated in para 4 above and to which learned counsel for the respondent/plaintiff countered as under:-

- (a) This Court as an appellate Court would not look into the issue of territorial jurisdiction in terms of Section 21 of CPC. Reliance in this regard is placed upon the judgment of the Supreme Court in the case of *Pathumma and Ors. v. Kuntalan Kutty and Ors., 1981 (3) SCC 589.*
- (b) On the issue of the entitlement/claim of respondent/plaintiff

being not satisfied, attention of this Court is invited to paras 4 and 7 of the agreement to show that clause 5 of the agreement which is relied upon by the appellants will not apply in case the employee resigns from services and is not terminated from services. Reliance is placed upon the judgment of the Supreme Court in the case of ***J.K. Cotton Spinning and Weaving Mills Company Ltd. v. State of U.P. and Ors., 1990 (4) SCC 27.***

(c) It is also argued on behalf of the respondent/plaintiff that the amount contained in the service bond automatically becomes payable by virtue of Section 74 of the Contract Act, 1872 and no trial was necessary of the suit. Reliance is placed upon the judgment of the learned Single Judge of the Madras High Court reported as ***Toshniwal Brothers (Private) Ltd. v. E. Eswarprasad and others., 1997 (1) LLN 398,*** and the judgment is also relied upon for the proposition that the service period has to be taken as a whole and cannot be split up into compartments to justify the reduction of penalty.

7. In my opinion, the appeal deserves to be allowed and unconditional leave to defend has to be granted to the appellants for the reasons as stated hereinafter.

8. Firstly, the Courts in Delhi *prima facie* had no territorial jurisdiction.

The service agreement shows that the appellants had signed the agreement at Jalandhar, Punjab and the employer had signed at Ropar, Punjab. The service agreement has been notarized at Chandigarh and the surety bond at Rupnagar. Even the stamp papers are of Punjab. Thus the agreement is not executed at Delhi. The only ground argued in this Court to claim territorial jurisdiction of Delhi was on account of clauses in the contract which provide that in case of disputes between the parties the Courts at Delhi only would have jurisdiction to entertain the suit. This argument on behalf of the respondent/plaintiff is misconceived because parties cannot confer jurisdiction on a Court which otherwise does not have any. A clause in an agreement to have jurisdiction of one Court, when there are more than one Courts which have jurisdiction, then such an agreement/clause would be valid, however, parties by consent cannot confer jurisdiction on a Court which does not have territorial jurisdiction. In the present case nothing has been pointed out as to how the Courts at Delhi will have territorial jurisdiction, inasmuch as, no part of cause of action is said to have accrued in Delhi. I need not cite the catena of judgments of the Supreme Court in this regard, but suffice to refer to the judgment of the Supreme Court in the case of *New Moga Transport Company vs. United India Insurance Co. Ltd & Ors., 2004 (4) SCC 677*. Admittedly, the appellants/defendants are also not residents of

Delhi and, therefore, even on this count it cannot be said that the Civil Courts at Delhi will have territorial jurisdiction. The arguments on behalf of the respondent/plaintiff relying upon Section 21 of the CPC and the judgment of the Supreme Court in the case of *Pathumma* (supra) is wholly misconceived, inasmuch as, the provision of Section 21 CPC applies if the defendant has an opportunity to take up the issue of lack of territorial jurisdiction at the stage of filing of the written statement, but does not raise this objection on or before framing of issues, and in such cases, the issue of territorial jurisdiction is deemed to be waived. The appellate Court would not allow the point of jurisdiction to be raised unless the issue of territorial jurisdiction also results in failure of justice, however, such arguments can only be raised when objection as to territorial jurisdiction is not taken on or before framing of issues. In the present case, since the suit is under Order 37 CPC the stage of filing of written statement is yet to come, and the appellants/defendants in this Order 37 CPC suit could have raised the issue of territorial jurisdiction only in leave to defend application and which objection has actually been raised. Therefore, I hold that the Courts at Delhi *prima facie* had no territorial jurisdiction and parties by consent cannot confer jurisdiction on the Delhi Courts which otherwise had none, simply by having clauses in the agreements between them. On this ground itself thus leave to defend ought to have been

granted.

9. Another ground on which leave to defend should have been granted was that the letters of appellant No.1 dated 28.8.1996 and 3.9.1996 clearly show the taking place of negotiations and encashment of the bank drafts totaling to a sum of ₹3,75,000/- by the respondent/plaintiff without any demur. Admittedly, the respondent/plaintiff could have refused to receive the bank drafts or if it had received the bank drafts it could have returned them back to the appellants/defendants, or in any case ought not to have encashed them, much less without any protest, but the respondent/plaintiff encashed the bank drafts, and which encashment, therefore, has to be in terms of the letters of the appellant No.1/defendant No.1 dated 28.8.1996 and 3.9.1996. *Prima facie*, therefore, there was an accord and satisfaction between the parties, and this point in itself would also entitle the appellants/defendants to unconditional leave to defend in the suit. The respondent/plaintiff very conveniently after encashing the bank drafts, straightway proceeded to file the suit, even without issuing of any legal notice. Such conduct of the respondent/plaintiff-company, which is a huge organization, clearly needs to be deprecated. Surely, the suit *prima facie*, is thus only an arm twisting tactic.

10. Even assuming that there was no accord and satisfaction, in my opinion, Clause 5 of the agreement clearly entitles the appellants to make

payment proportionate to the period which is not served in discharge of their liability. Of course Clause 5 seems to apply by its language only when there is termination of services of the employee for serious acts of misconduct etc, however, termination of service is definitely a much more serious aspect than a mere voluntary resignation of an employee. If because of the misconduct or any other serious act of an employee there is termination of services and still the respondent/plaintiff in such serious circumstances, mentioned in Clause 5 of the agreement, is entitled only to ask for proportionate payment for the unserved period of the service contract, then surely on a lesser issue of simple resignation from service, it is open to the appellants to content that only proportionate amount of the surety bond is payable. In fact I am observing in regard to issue of termination of services as against resignation purely in defence to the argument of the counsel for the respondent, inasmuch as, clause 5 applies even for resignation and which expression is specifically mentioned in clause 5. Bonafides of the appellants, in this case, is more than clear from the fact that as much as ₹3,75,000/- out of the amount of ₹5,00,000/- had already been paid to the respondent/plaintiff and appellant No.1 has also served for a period of one year and three months after returning from training at Germany. Therefore, in the light of the aforesaid facts this ground again was a ground in itself to grant the appellants unconditional leave

to defend the suit.

11. Finally in my opinion, in the facts of the present case, it cannot be said that on mere breach of service bond the entire damages which are claimed under a service bond would automatically become payable and such suits had to be decreed. If I accept the argument of the respondent/plaintiff it would mean not only in an Order 37 CPC suit but in every suit where the service bond is relied upon, once there is found to be due execution of service bonds, the suit for recovery of money should/ought to be decreed without allowing the defendants/appellants in the suit to contest the case during the trial to show that the amount as claimed is not payable including for the reasons that actually the amounts which were spent on the employee were not as alleged by the employer, also that the damages which are said to be payable under service bonds are in the nature of penalty, inasmuch as, the employer may have suffered a lesser damage or probably no damage. I may note that Section 74 of the Contract Act provides for imposition of reasonable damages and the liquidated damages provided in the agreement are only the upper limit beyond which damages cannot be granted.

12. I have already made telling observations against the respondent-company, but I have been forced to make these observations in view of the facts of this case which show that whereas an employee on his part has, in

fact, acted more than fairly, the same cannot be said of the respondent/employer. There are cases where even after execution of a service bond, the employee simply walks out without making any payment, but in the present case appellant No.1/employee has been extremely fair, inasmuch as, an amount of ₹3,75,000/- has been paid to the respondent-company under the service bond, of which at best an amount of ₹5,00,000/- was payable, besides having served for a period of one year and three months. Not only that, the respondent/plaintiff-company very conveniently encashed the bank drafts after receiving them without any protest and, thereafter, simply went to the Court much later and filed the subject suit without even issuing a legal notice to the appellants/defendants, and which if given, the appellants would have responded accordingly in terms of its defences in leave to defend application.

13. In view of the aforesaid facts, I am of the categorical opinion that the impugned judgment illegally and wrongly dismissed the leave to defend application. The facts of the present case, as stated above, show the entitlement of the appellants/defendants to unconditional leave to defend and I grant unconditional leave to defend accordingly by allowing this appeal and setting aside the impugned judgment dated 20.10.1998. The appellants/defendants will file written statement in the suit within four weeks of the first effective date which will be fixed by the concerned Court, after

remanding of this matter.

14. The Supreme Court in the recent judgment of *Ramrameshwari Devi and Others v. Nirmala Devi and Others*, (2011) 8 SCC 249 has held that it is high time that actual costs must be imposed so that a party which has unfairly filed litigation, is not benefited. I am also empowered to impose actual costs by virtue of *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15*. In view of the facts as stated above, I am of the opinion that this appeal should be allowed with costs which I quantify at ₹20,000/-. Costs be paid within a period of four weeks from today.

15. Parties to appear before District & Sessions Judge, Tis Hazari, Delhi on 30th May, 2012, and on which date the District & Sessions Judge will mark the suit for disposal to a competent Court in accordance with law. Trial Court record be sent back so as to be available to the District & Sessions Judge on 30th May, 2012.

16. Since the appeal is allowed, the amount deposited in this Court by the appellants alongwith accrued interest, if any, be forthwith released back to the appellants by making a cheque in the name of appellant No.2, who is the father of appellant No.1. The cheque be returned to appellant No.2 through his counsel. Nothing contained in this judgment is a final reflection on merits

of this matter as I have only dealt with the issue of leave to defend and the trial Court will now hear and dispose of the suit in accordance with law.

VALMIKI J. MEHTA, J.

APRIL 24, 2012

AK