

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

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Date of decision: 17th December, 2013

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RFA 645/2004

INCENT TOUR P. LTD.

..... Appellant

Through: Mr. G.S. Narula & Mr. Ravi Pal, Adv.

Versus

DINESH GARG

..... Respondent

Through: Mr. S.K. Mishra, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 31st August, 2004 of the Court of the Addl. District Judge, Delhi in Suit No.34/2003 filed by the respondent for recovery of Rs.1,86,000/- from the three appellants i.e. the appellant no.1 Company and its Managing Director Shri P.N. Nageshwaran and its Director Mrs. Meenu Nageshwaran as well as in the counterclaim filed by the appellant no.1 Company for recovery of Rs.4,69,252/- from the respondent) dismissing the counterclaim of the appellant no.1 Company and allowing the suit of the respondent for recovery of Rs.98,000/- with costs and interest from the appellants.

2. Notice of the appeal was issued and the Trial Court record requisitioned and subject to the appellants/defendants depositing the decretal

amount in this Court, the execution of the money decree against the appellants/defendants was stayed. A sum of Rs.1,23,600/- is reported to have been deposited in compliance thereof and has been kept in a FDR. The appeal was on 7th April, 2005 admitted for hearing. The counsels have been heard. Though the Trial Court record, upon the appeal being dismissed in default of appearance on 21st May, 2013, was sent back and is not available but the counsels inform that the copies of the entire relevant Trial Court record have been filed along with the Memorandum of Appeal and have during the hearing handed over the affidavits by way of examination-in-chief of the appellant/defendant no.2 and the respondent/plaintiff which were not on record. The counsel for the respondent/plaintiff has also during the course of hearing handed over a brief synopsis of his submissions and which is taken on record.

3. Though technically two separate appeals, one against the money decree against the appellants/defendants in the suit filed by the respondent/plaintiff and one against the dismissal of the counterclaim filed by the appellants/defendants, ought to have been filed but it is found that the appellants/defendants have valued the appeal for the purposes of Court Fees and jurisdiction on the combined valuation of the suit as well as the

counterclaim; moreover no objection in this regard has been taken during the last nearly nine years since when the appeal is pending before this Court and the appeal has been treated as against the money decree against the appellants/defendants as well as against the decree of dismissal of counterclaim of the appellants/defendants and it is not deemed expedient to go into the said technicality at this stage.

4. The respondent/plaintiff instituted the suit for recovery of Rs.1,86,400/- from the appellants, pleading:-

- (a) that the respondent/plaintiff joined the employment of the appellant/defendant no.1 Company in July, 1999 as Chief Accountant at a monthly salary of Rs.11,000/- exclusive of other allowances;
- (b) that the salary of the respondent/plaintiff w.e.f. 1st April, 2001 was increased to Rs.23,000/- p.m.;
- (c) that till 2nd January, 2003 everything was going well; on 3rd January, 2003 the appellant/defendant no.2 called the respondent/plaintiff to his chamber and asked him to hand over the keys of the car, *almirah* and all the company records,

documents and assets of the appellant/defendant no.1 Company in his custody;

- (d) that on 4th January, 2003 though the respondent/plaintiff went to work but his services were not utilized; rather he was abused and insulted in front of other staff;
- (e) the respondent/plaintiff met with the same fate on 6th January, 2003;
- (f) that on 6th January, 2003 the respondent/plaintiff sent a fax message claiming his dues on account of his hidden notice of termination from the services;
- (g) that the appellants/defendants however by reply to the fax asked the respondent/plaintiff to report for duty;
- (h) that on 11th January, 2003 the appellants/defendants again sent a letter asking the respondent/plaintiff to join duty; and,
- (i) that the respondent/plaintiff sent another reply dated 13th January, 2003 for clearance of his dues followed by a legal notice dated 15th January, 2003 but the dues of Rs.1,86,400/- were not cleared.

accordingly, the suit for recovery thereof was filed.

5. It was the case of the appellants/defendants in their written statement-cum-counterclaim:-

- (i) that the respondent/plaintiff was employed as the Chief Accountant with the appellants/defendants and had misappropriated an amount of Rs.4,69,252/-;
- (ii) that the respondent/plaintiff was called upon to explain the glaring discrepancies in the cash amounts that were being maintained by the respondent/plaintiff; there was a cash balance of Rs.5,37,272.23p as on 30th November, 2002 but on physical verification on 2nd December, 2002, only a sum of Rs.71,420/- was handed over/explained by the respondent/plaintiff to the appellants/defendants;
- (iii) that the respondent/plaintiff had failed to reconcile the accounts or expenditure, the discrepancy in accounts and had also failed to handover the details of assets, documents which were under his care and custody;
- (iv) denying the incidents of 4th and 6th January, 2013;

(v) that the respondent/plaintiff had last reported for work on 3rd January, 2003 and failed to report for work thereafter and had thus abandoned his post as Chief Accountant and as such his claim for two months salary on account of notice was baseless; and,

(vi) the claim for LTC and medical as claimed by the respondent/plaintiff was also pleaded to be not an allowance but the reimbursement on the basis of actuals and for which no bills had been submitted by the respondent/plaintiff.

accordingly, a claim for recovery of Rs.4,69,252/- misappropriated by the respondent/plaintiff was made.

6. Needless to state that the respondent/plaintiff in replication-cum-written statement to the counterclaim denied having misappropriated any monies.

7. On the pleadings of the parties, the following issues were framed in the suit as well as in the counterclaim on 4th September, 2003:-

“1. Whether the suit is not maintainable and liable to be dismissed under Order 7 Rule 11 CPC? OPD

2. *Whether the plaintiff is entitled to the decree for sum of Rs.1,86,000/- against the defendants? OPD*
3. *Whether defendant is entitled to decree for sum of Rs.4,97,407/- along with pendente lite and future interest @ 18% p.a? OPD*
4. *Relief.”*

8. The respondent/plaintiff and the appellant/defendant no.2 appeared in support of their respective cases.

9. The learned Addl. District Judge has vide the impugned judgment, as aforesaid, dismissed the counterclaim of the appellants/defendants and decreed the suit of the respondent/plaintiff in the sum of Rs.98,000/- only against the appellants/defendants with interest, finding/observing/holding:-

- A. that the appellants/defendants had failed to show as to why the suit was not maintainable;
- B. that out of Rs.1,86,400/-, the respondent/plaintiff had claimed a sum of Rs.46,000/- on account of two months' salary for notice period, Rs.52,000/- on account of leave encashment for 68 days and the balance towards LTC, Medical, Ex-gratia payment etc.;
- C. that though the appellants/defendants in their replies dated 7th January, 203 (Ex.PW1/B) and dated 11th January, 2003

(Ex.PW1/C) denied having terminated the services of the respondent/plaintiff or having discharged him from duty and asked him to report back and wherefrom it appeared that the respondent/plaintiff was working in the appellant/defendant no.1 Company till then, but in the reply dated 28th January, 2003 (Ex.PW1/D11) to the legal notice for the first time stated that the respondent/plaintiff had failed to reconcile the discrepancies in accounts; the same plea was taken in the written statement also; thus the defence of the appellants/defendants in the reply to the legal notice and in the written statement was contradictory to the earlier replies;

- D. normally in case any employee fails to attend the office for a day or two without any intimation, he is issued memo or notice to show cause for his non-appearance;
- E. that the use of the words “neither terminated your services nor discharged you of your duties” in the reply dated 7th January, 2003 of the appellants/defendants thus appeared to be for the reason that the appellants/defendants were no more interested to utilize the services of the respondent/plaintiff;

- F. that the appellants/defendants had failed to show as to why proceedings for dereliction of duty were not initiated against the respondent/plaintiff inspite of the respondent/plaintiff not attending the office after 3rd January, 2003;
- G. that the respondent/plaintiff was thus held entitled to salary in lieu of notice of two months' amounting to Rs.46,000/-;
- H. the respondent/plaintiff was also held entitled to leave encashment of Rs.52,000/- (details in this respect are not given as the counsel for the appellants/defendants has, subject to the decision on their counterclaim, not disputed the entitlement of the respondent/plaintiff to the said amount);
- I. the respondent/plaintiff was held not entitled to any other amount (again particulars in this regard are not stated as the respondent/plaintiff has neither challenged the denial of the said amounts to him nor in the hearing has challenged the said finding);
- J. that the testimony of the appellant/defendant no.2 was contradictory and untrustworthy and replete with discrepancy;

- K. according to the appellants/defendants, the discrepancy in the accounts was discovered on 2nd December, 2002 but no action was taken against the respondent/plaintiff and no explanation also for inaction was furnished;
- L. that the appellants/defendants in their replies dated 7th January, 2003 and 11th January, 2003 also did not refer to any such discrepancy in accounts or misappropriation on the part of the respondent/plaintiff;
- M. the appellants/defendants for the first time in reply to the legal notice took the plea of discrepancy in the accounts;
- N. had the respondent/plaintiff siphoned off such a huge amount, an FIR would have been lodged;
- O. though the appellant/defendant no.2 in his cross examination claimed having issued memo to the respondent/plaintiff, no such memo was filed/proved; and,
- P. no employee from the accounts department of the appellant/defendant no.1 Company had been examined.

accordingly, the appellants/defendants were held not entitled to their counterclaim and the respondent/plaintiff was held entitled to leave encashment of Rs.52,000/- and two months' salary of Rs.46,000/- in lieu of notice of termination i.e. total Rs.98,000/- with interest at the rate of 12% per annum from the date of filing of the suit till realization.

10. I may at the outset notice that though the impugned judgment records the plea of the respondent/plaintiff, if the appellants/defendants having asked the respondent/plaintiff on 3rd January, 2003 to handover the keys of the car, almirah and all Company's records but the document proved by the respondent/plaintiff himself in this regard shows the respondent/plaintiff to have handed over the keys of the car on 3rd December, 2002 i.e. on the very next day of 2nd December, 2002 when discrepancy in accounts is stated to have been discovered.

11. The counsel for the appellants/defendants has argued:-

I. that the version of the appellants/defendants, of the appellants/defendants having on 3rd December, 2002 taken away the custody of the car earlier provided to the

respondent/plaintiff and which is not in dispute ought to have been accepted;

- II. that the counterclaim of the appellants/defendants has been rejected only for the reason of the appellants/defendants having not lodged an FIR against the respondent/plaintiff;
- III. that the civil claim of the appellants/defendants cannot be defeated for not resorting to the criminal course of action;
- IV. that there is no basis whatsoever for the two months' notice period salary of Rs.46,000/- awarded to the respondent/plaintiff;
- V. that there was no contract for payment of two months' salary in lieu of notice in the event of termination of employment;
- VI. that even otherwise from the admitted correspondence on record, it is the admitted position that the respondent/plaintiff on his own left the employment of the appellant/defendant no.1 Company and the respondent/plaintiff for this reason also is not entitled to any notice period salary as the appellant/defendant

no.1 Company has not terminated the employment of the respondent/plaintiff;

VII. that the respondent/plaintiff signed the attendance register proved as Ex.PW1/D13 till 3rd January, 2003 and thereafter has been marked as absent therein;

VIII. that the respondent/plaintiff even while withdrawing his provident fund, in the column “reason for leaving service” stated “left the organization on own”;

IX. that the learned Addl. District Judge has thus erred in giving two months’ notice period salary to the respondent/plaintiff;

X. that the discrepancy in accounts is evident from the cash book proved as Ex.PW1/D8 showing the closing balance as Rs.5,37,272.23p and Ex.PW1/D9 bearing the signatures of the respondent/plaintiff also recording cash of only Rs.68,020/- having been found (the balance amount of Rs.3,400/- was explained);

XI. that the respondent/plaintiff in his cross examination admitted that he was responsible for maintaining all accounts, controlling

cash, inflow and outflow of the appellant/defendant no.1
Company and the bank matters;

XII. that the respondent/plaintiff in cross examination also admitted that the closing balance as per cash book as on 30th November, 2002 was Rs.5,37,272.23p and that the cash available on that date was only Rs.68,020/-;

XIII. that the explanation given by the respondent/plaintiff for the shortfall of the cash having been given by the appellant/defendant no.2 to Government officials and to some other persons, was not believable in as much as there would have been entry thereof and a voucher thereof would have been prepared; and,

XIV. that no such explanation was given in the written statement to the counterclaim also was an afterthought.

12. Per contra, the counsel for the respondent/plaintiff has argued:-

(a) that the factum of the appellants/defendants having created circumstances to compel the respondent/plaintiff to leave the

employment are evident from taking back the car from him on 2nd December, 2002;

- (b) had the respondent/plaintiff abandoned employment, the appellant/defendant no.1 Company would have charge sheeted the respondent/plaintiff for the same;
- (c) that the plea of discrepancy in accounts was taken as an afterthought after 50 days;
- (d) that the shortfall of Rs. 4,69,252/- had been put in the suspense account; and,
- (e) that earlier also as evident from the cash book, monies were put in suspense account and while doing so also no particulars or voucher number were given.

13. I have while dictating this judgment also gone through the brief synopsis of submissions handed over by the counsel for the respondent/plaintiff during the hearing and find the respondent/plaintiff to have therein also challenged the denial of the other claims made in the suit. This practice has but to be deprecated. The counsel for the respondent/plaintiff during the arguments did not urge anything in this

respect and handed over the written submissions only when the counsel for the appellants/defendants was handing over copies of the affidavits by way of examination-in-chief on record of the Trial Court. The written synopsis was not intended to be a substitute for oral arguments. Thus, the said challenges, which was not argued, is not dealt with.

14. I have considered the rival contentions. The adjudication required, falls under two heads. Firstly, whether the judgment of the learned Addl. District Judge in favour of the respondent/plaintiff awarding Rs.46,000/- to the respondent/plaintiff towards two months' salary in lieu of notice period is liable to be interfered with. Secondly, whether the judgment of the learned Addl. District Judge dismissing the counterclaim of the appellants/defendants is liable to be interfered with.

15. The learned Addl. District Judge has not given any basis for the entitlement of the respondent/plaintiff to two months' salary in lieu of notice period, even if the finding of the appellant/defendant no.1 Company having terminated the services of the respondent/plaintiff were to be agreed with. Ordinarily such clauses are contained in the appointment letter or the service conditions if any of the employer. The respondent/plaintiff in his evidence has neither proved any appointment letter providing for notice of two

months payment of salary in lieu thereof in the event of termination of employment or any service rules/conditions in this regard. The inference thus is that neither in the letter of appointment if any nor in the service conditions is there any provision for notice of any prescribed period for termination of employment or for salary in lieu thereof, though reasonable notice, in some judgments has been held to be implicit. It may also be noticed that the appellants/defendants in cross examination of the respondent/plaintiff did not suggest that no such notice was necessary and on the contrary suggested that there was no liability in law or contract to serve two months' notice because the respondent/plaintiff had left the services on his own.

16. The next question is whether the services of the respondent/plaintiff were terminated by the appellants/defendants or the respondent/plaintiff had left the service of his own.

17. The position which emerges from the records is:-

- (i) that on 2nd December, 2002 details of physical cash available as on that date were drawn up and signed by the

respondent/plaintiff as well as the other officials of the appellant/defendant no.1 Company;

- (ii) that the respondent/plaintiff handed over the keys of the car provided by the appellant/defendant no.1 Company on 3rd December, 2002;
- (iii) on 6th January, 2003 the respondent/plaintiff while expressing thanks to his team for co-operation during the term of his service from “July, 1999 till date” made a claim for settlement of his dues of Rs.1,86,400/- and therein stated to “hidden notice of termination of my services has been given to me”;
- (iv) the appellant/defendant no.1 Company vide its reply dated 7th January, 2003 denied having terminated the services of the respondent/plaintiff or having discharged the respondent/plaintiff from his duties and asked him to report immediately;
- (v) no reply/response was given by the respondent/plaintiff to the above;

- (vi) that the appellant/defendant no.1 Company vide another letter dated 11th January, 2003 informed the respondent/plaintiff that since he had in response to the communication dated 7th January, 2003 not reported to work and his absence was hampering functioning of the accounts department, it was presumed that the respondent/plaintiff was not interested in working with the appellant/defendant no.1 Company and asking the respondent/appellant to either hand over charge or resume duties;
- (vii) the respondent/plaintiff again did not respond and got sent a legal notice dated 15th January, 2003 stating that due to humiliation afflicted on him he was not willing to work for the appellant/defendant no.1 Company; and,
- (viii) the same stand was reiterated by the respondent/plaintiff while appearing as a witness, in cross examination.

18. I am, on the basis aforesaid position emerging from admitted documents, unable to agree with the conclusion reached by the learned Addl. District Judge, of the appellant/defendant no.1 Company having terminated

the services of the respondent/plaintiff. It may be noticed that inspite of the alleged discrepancy in accounts having been discovered on 2nd December, 2002, the respondent/plaintiff continued to attend the office till 3rd January, 2003; during the said period no memo or charge sheet was given to him, though of course the car of the appellant/defendant no.1 Company which he was using was returned back by him. However the car was also returned on 3rd December, 2002. The respondent/plaintiff as aforesaid continued attending office till 3rd January, 2003. Even if it is to be argued that the atmosphere in the office of the appellant/defendant no.1 Company was inimical towards the respondent/plaintiff, the same does not amount to termination of employment. The respondent/plaintiff on his own, to avoid the said inimical atmosphere choose to abandon the employment. I am also intrigued by the conduct of the respondent/plaintiff of, inspite of the communications aforesaid dated 7th January, 2003 and 11th January, 2003 of the appellant/defendant no.1 Company, not reporting for duty or not stating that he was willing to work provided his service conditions were restored. If an employee, to avoid service of charge sheet or a memo or a disciplinary action, chooses to leave the employment, the same can by no stretch of

imagination be said to be termination so as to be entitled him/her to notice of termination or salary in lieu thereof.

19. The decree by the learned Addl. District Judge for the sum of Rs.46,000/- on this account cannot thus be sustained and is liable to be set aside and the appeal entitled to succeed to the said extent.

20. I next come to the counterclaim of the appellant/defendant no.1 Company. Though the mere fact of not lodging an FIR cannot deprive the appellant/defendant no.1 Company of its civil remedies, but the appellant/defendant no.1 Company has been unable to establish misappropriation of the sum of Rs. 4,69,252/- by the respondent/plaintiff.

21. As aforesaid, the physical verification of the cash vis a vis the cash in hand shown in the account books was done on 2nd December, 2012. The appellant/defendant no.1 Company on that date was thus aware of the shortage. The appellant/defendant no.1 Company however till 3rd January, 2003, till when the respondent/plaintiff was attending duties, neither gave any charge sheet or memo or took any other disciplinary proceedings against the respondent/plaintiff. No explanation also of the missing cash if any was sought from him in the said period of one month. The only inference can be

that the appellant/defendant no.1 Company was aware of the reasons for the said discrepancy if any and did not blame the respondent/plaintiff therefor. Not only so, even when the respondent/plaintiff by his letter dated 6th January, 2003 made it clear that he was leaving the employment of the appellant/defendant no.1 Company and claimed his dues, in the replies dated 7th January, 2003 and 11th January, 2003 thereto, no mention of the discrepancy was made. It is only when the respondent/plaintiff got issued a legal notice that in the reply thereto, such a plea was taken.

22. The learned Addl. District Judge is also correct in reasoning that the other persons in the accounts department who are signatory to the physical verification on 2nd December, 2012 have not been examined.

23. No error is thus found in the dismissal by the learned Addl. District Judge of the counterclaim of the appellants/defendants and the appeal to that extent is liable to be dismissed.

24. The appeal is thus partly allowed. The judgment and decree in favour of the respondent/plaintiff and against the appellants/defendants to the extent of Rs.46,000/- is set aside. Resultantly, the impugned judgment and decree is

modified by holding the respondent/plaintiff to be entitled to recovery of Rs.52,000/- only from the appellants/defendants.

25. The learned Addl. District Judge had awarded interest at the rate of 12% per annum from the date of institution. In the facts and circumstances of the case and the falling rates of interest and the long period of time for which the disputes have remained pending, the rate of interest is found to be on the higher side and is reduced to 9% per annum. The respondent/plaintiff will thus be entitled to recovery of Rs.52,000/- with interest at 9% per month from the date of institution of the suit till realization.

Decree sheet be drawn up.

26. Out of the amounts deposited by the appellants/defendants in this Court, the decretal amount so computed be released to the respondent/plaintiff and the balance if any be refunded to the appellant/defendant no.1 Company.

RAJIV SAHAI ENDLAW, J

DECEMBER 17, 2013

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