

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

Date of decision: 2nd December, 2013.

+ **RFA 560/2013 & CM No.19100/2013 (for condonation of 2 days delay in filing the appeal)**

SHUBH GAUTAM

..... Appellant

Through: Mr. H.K. Chaturvedi and Ms. Anjali Chaturvedi, Advocates.

Versus

NABANITA MUKHERJEE

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 3rd August, 2013 of the Court of the Additional District Judge (ADJ) (Central)-01, Tis Hazari Courts Delhi of dismissal of CS No.271/2009 (Unique I.D. No.02401C0868302006) filed by the appellant for recovery of Rs.5 lakhs from the respondent.

2. Though this is a first appeal and is coming up before this Court today for the first time but the counsel for the appellant/plaintiff having along with the memorandum of appeal filed all the relevant Trial Court record and being *prima facie* of the opinion formed on the basis of reading of the

judgment that the issue involved is no longer *res integra*, instead of dealing with the application of the appellant/plaintiff for condonation of two days delay in filing the appeal, the counsel for the appellant/plaintiff has been heard finally on the appeal.

3. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading:

- (i) that the sole proprietary of the appellant/plaintiff M/s. Sriram Compounds is a star export house, engaged in the business of manufacturing of import substitute products like lining compounds and sealing systems for food and beverage industries;
- (ii) that in view of the specialized nature of the work, all the employees have to undergo various periods of training, hands on experience, including that of understanding the importance of the principles and policies for manufacturing food contact packaging products;
- (iii) that the respondent/defendant joined the employment of the appellant/plaintiff with effect from 1st December, 2003 as a Chemist and executed a service indemnity bond dated 1st December, 2003 binding herself to work for the appellant/plaintiff for a period of five

years with effect from 1st December, 2003 and agreeing to indemnify the appellant/plaintiff in the sum of Rs.5 lakhs in the event of discontinuing the service before the contracted period;

(iv) that the respondent/defendant, in violation of the service indemnity bond, sent a letter dated 18th February, 2006 stating that she would be unable to continue with the services as her husband was moving to Dubai and also on medical grounds but without any supporting documents;

(v) that the appellant/plaintiff vide letter dated 22nd February, 2006 asked the respondent/defendant to deposit the sum of Rs.5 lakhs for prematurely leaving the services of the appellant/plaintiff and after obtaining all training etc., as undertaken in the service indemnity bond.

Upon non-compliance by the respondent/defendant, the suit for recovery of Rs.5 lakhs with interest was filed.

4. Though the suit was originally filed under Order 37 of the Civil Procedure Code (CPC), 1908 but was converted into an ordinary suit. The respondent/defendant contested the suit, though not disputing the execution of the service indemnity bond but denying that any training was imparted to

her and further pleading that though the bond was got executed stating that the respondent/defendant would be deputed to Italy and Germany for specialized training but was not so deputed and denying her liability in any amount and further pleading the terms of the service bond to be illegal and oppressive to public conscience. It was also pleaded that the respondent/defendant had fallen sick owing to long and onerous duty imposed by the appellant/plaintiff on her and that the appellant/plaintiff had not suffered any loss from her leaving the employment.

5. The appellant/plaintiff in his replication averred that the two projects on which the respondent/defendant was working had been left halfway owing to the respondent/defendant prematurely leaving the employment.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 11th September, 2007:

- “i) Whether the service bond is on insufficient stamp paper, if so, its effect? OPP*
- ii) Whether the defendant was incapable of performing her duties due to her ailment, if so, its effect? OPD*
- iii) Whether the plaintiff is entitled to recover the suit amount? OPP*
- iv) Relief.”*

Neither of the parties examined any other witnesses besides themselves.

7. The learned ADJ has dismissed the suit, finding/observing/holding:

(a) that the service bond was executed on stamp paper of Rs.10/-; that the respondent/defendant has failed to show that the same was insufficiently stamped; accordingly, the Issue No.(i) was decided in

favour of the appellant/plaintiff and against the respondent/defendant;

(b) that though the medical record proved by the respondent/defendant showed her to be only suffering from acute back pain and the respondent/defendant having been advised to take rest and to avoid prolonged standing, climbing stairs and avoid jerk and not to lift heavy weight and to not travel through public transport but it was also her evidence that she was required to perform her matrimonial obligations and was not able to continue working; the same constituted sufficient evidence to show that the respondent/defendant was medically unfit to continue with the job with the appellant/plaintiff;

(c) that it was also uncontroverted evidence of the respondent/defendant that after leaving employment with the appellant/plaintiff, she did not work and joined another organization only in August, 2006 and which also established that the

respondent/defendant was unable to work for six months; accordingly, Issue No.(ii) was decided against the appellant/plaintiff and in favour of the respondent/defendant;

(d) that an employer is not allowed to take away fundamental freedom of the employee by imposing harsh conditions through service bond;

(e) that the respondent/defendant had not left the job of the appellant/plaintiff deliberately or intentionally or with a view to cause wrongful loss to the appellant/plaintiff or wrongful gain to herself;

(f) that the appellant/plaintiff had failed to prove that the respondent/defendant joined another organization at a higher salary;

(g) that the appellant/plaintiff had admitted that 80—100 employees worked in his establishment and it is difficult to believe that the performance of the entire organisation was dependant only upon the services of the respondent/defendant;

(h) that though certain losses must have been suffered by the appellant/plaintiff on account of the respondent/defendant leaving the job but it was not specifically proved as to what was the extent of loss;

(i) that it stood established that the respondent/defendant left the employment for circumstances beyond her control and thus cannot be penalized therefor;

(j) that the appellant/plaintiff had failed to show by cogent and sufficient evidence that losses to the tune of Rs.5 lakhs were suffered;

(k) that the appellant/plaintiff had not proved that any of the machines were bought by the appellant/plaintiff only due to the respondent/defendant joining the services of the appellant/plaintiff.

Accordingly, the suit was dismissed.

8. The counsel for the appellant/plaintiff has argued that once the learned ADJ had accepted that certain losses must have been suffered by the appellant/plaintiff on account of the respondent/defendant leaving the job, the learned ADJ was bound to award some compensation at least to the appellant/plaintiff even in the absence of any evidence having been led by the appellant/plaintiff of having suffered any loss. Reliance is placed on Section 74 of the Indian Contract Act, 1872.

9. I may at the outset refer to the judgment dated 24th April, 2012 of this Court in RFA No.195/2004 titled *V.S. Saini Vs. D.C.M. Ltd.* holding that on mere breach of service bond, the amount thereof would not become

payable and that no claim on the basis of service bond can be accepted without showing any damage. It was held 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. The same learned Judge in an earlier judgment in *M/s. Sicpa India Ltd. Vs. Shri Manas Pratim Deb* MANU/DE/6654/2011 had also held that such clauses in service bond are in the nature of penalty and are void and the liquidated damages mentioned in such bond are only the upper limit of the damage which are awarded once actual damages are proved; accordingly, the judgment of the Trial Court of dismissal of the suit for recovery of the service bond amount was upheld.

10. I have perused the affidavit by way of examination-in-chief of the appellant/plaintiff and do not find even a whisper therein of any consideration for the respondent/defendant to have bound herself to serve the appellant/plaintiff for a period of five years or of any training having been imparted by the appellant/plaintiff to the respondent/defendant or of the appellant/plaintiff having suffered any loss whatsoever on account of the respondent/defendant leaving the employment. Though in the absence of any such case in the examination-in-chief, there was no need for the

respondent/defendant to cross-examine the appellant/plaintiff on the said aspects but still cross-examination was done and nothing is found to have emerged therein. I have also perused the cross-examination by the appellant/plaintiff of the respondent/defendant and do not find the appellant/plaintiff to have therein also established any such case.

11. Reference in this regard may be made to a recent judgment of the Division Bench of this Court in ***Vishal Engineers and Builders Vs. Indian Oil Corporation Ltd.*** MANU/DE/6829/2011 reiterating that in the absence of any loss whatsoever, an aggrieved party cannot claim that it is still entitled to liquidated damages, without, at least proving a semblance of loss.

12. There is another interesting aspect of the matter which emerges from the record, though was not taken as a defence by the respondent/defendant and has thus not been adjudicated.

13. The respondent/defendant as aforesaid, joined the employment of the appellant/plaintiff with effect from 1st December, 2003; she was on that date issued a letter of appointment, as per which she was to be on probation for a period of one year and during which period her services were liable to be terminated without assigning any reason or notice or compensation in lieu thereof. The service bond which was sought to be enforced, is also dated 1st

December, 2003 and whereunder the respondent/defendant bound herself to serve the appellant/plaintiff for five years and to indemnify the appellant/plaintiff for Rs.5 lakhs in case of discontinuing her services before the contracted period. The appellant/plaintiff thereafter, on completion of the probation period, issued letter dated 1st December, 2004 to the respondent/defendant confirming her employment on the terms and conditions contained therein. Clause 3 of the said letter was as under:

“3. TERMINATION OF SERVICES:

- i. After confirmation in writing of your services, the management shall have the right to terminate this appointment by giving you three months notice. The company reserves the right to pay you in lieu of notice, a sum by way of compensation equal to three months emoluments consisting of basic salary, HRA and bonus entitlement, if any on the declaration.*
- ii. In case you wish to resign, you shall have to give three month notice and the management reserve its right to either accept the money in lieu or to relieve you of your duties prior to the expiry of the notice period without any compensation for the part or full notice period as the case may be.*
- iii. That your services will be liable for termination without any notice or pay in lieu thereof at any time during the continuance of your employment on the following grounds:*
 - If the management finds that the particulars supplied by you either in the application form or*

at the time of interview are incorrect.

- *If the management finds that you are guilty of misconduct, wilful negligence, disobedience, misappropriation, insubordination and breach of this appointment letter and acts of the like nature i.e. misfeasance, malfeasance and nonfeasance.”*

There is no mention whatsoever of the service bond in the said letter and the same is not made subject to the terms of the service bond.

14. In my opinion, the service bond being purely contractual, the contract as contained in the service bond dated 1st December, 2003, stood modified in the subsequent confirmation letter dated 1st December, 2004 and whereunder the respondent/defendant was entitled to leave the employment of the appellant/plaintiff by a three months' notice or salary in lieu thereof. For this reason also, the judgment of the learned ADJ, cannot be found fault with.

15. In that view of the matter, I am refraining from going into another question which arises, as to whether such service bonds are unconscionable void and unenforceable.

16. There is no merit in the appeal, which is dismissed. No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 02, 2013/bs..