

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

+ **CS(OS) No.936/2004**

% **23rd September, 2015**

VINOD PATHAK Plaintiff

Through: Ms. Garima Prashad, Advocate.

versus

AMERCIAN EXPRESS BANK LTD. Defendant

Through: Mr. Sumit Bansal, Mr. Ateev Mathur
and Mr. Amol Sharma, Advocates.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Plaintiff Sh. Vinod Pathak, who was an employee; being a security in-charge; employed with the defendant, has filed the present suit seeking the reliefs of declaration, injunction and damages as under:-

PRAYER

“For the various facts and reasons stated above, the plaintiff prayed that the Honourable Court be pleased to:

A. Declaration may very kindly be granted by holding that the resignation letter dated 6 July 2004 which has been obtained by using force, undue advantage and coercion be declared as null and void, illegal and of no legal consequence.

- B. Declaration may very kindly be granted to the effect that the contract of the employment between the party subsist and continue till the plaintiff is reinstated and restore in service.
- C. Declaration may very kindly also be granted to the effect that the plaintiff is entitled of the salary, perks and all other consequential benefits from the date when he was forced to tender his resignation till he is reinstated in service.
- D. Mandatory injunction may also be granted thereby directing the defendant not to give affect to the purported resignation letter dated 6th July 2004, and the operation and effect of the alleged resignation letter may also be stayed.
- E. Mandatory injunction may also be granted thereby directing the defendant to permit the plaintiff for performing his visual duties, which he has earlier performing without any hindrance and obstructions.
- F. Defendant be restrained from enforcing the resignation order which has been forcibly taken by the Defendant from the plaintiff vide letter dated 6/7/2004.
- G. Plaintiff be allowed to join the inquiry which has been initiated against him.
- H. Plaintiff be restored and reinstated to the original position where he was working at the time when the forced resignation was taken from the Plaintiff by the defendant or direct the defendant to pay damages to the plaintiff at the rate of Rs.Three Lac per month till the final decision of this case.
- I. Without prejudice to the plaintiff by way of abandoned precaution is also praying for a declaration from this Honourable Court to the effect that plaintiff is entitled towards damages as mentioned above for the illegal and unjust act of the defendant in case the Honourable Court comes to the conclusion that no relief of restatement can be granted
- J. Any other relief to which the plaintiff is entitled may be granted.
- K. Cost of the suit may be awarded to the plaintiff.”

(underlining added)

2. Admittedly, the employment of the plaintiff with the defendant is a private employment since the defendant is not a State or an authority of State as per Article 12 of the Constitution of India. Once the contract of employment is a private contract of employment, not being governed by the statutory rules or provisions of the Constitution of India, the issue which arises is whether such a suit seeking relief of reinstatement of service is permissible or if the plaintiff is entitled to the monetary amount and damages for every month as claimed by him and the other related reliefs.

3. I note that this suit is of the 2004 vintage and issues in the suit were framed way back on 1.8.2005. Thereafter for various years evidence of the plaintiff was being recorded and during this period an application was filed by the defendant being I.A No. 2629/2004 for amendment of the written statement to add certain pleas with respect to damages not being granted to the plaintiff because plaintiff was gainfully employed after termination of service with the defendant and also that the plaintiff has run its own security agency and thus carried on business disentiing the plaintiff to the claim of damages.

4. When this application being I.A No. 2629/2004 came up before this Court on 4.9.2015, the following Order was passed:-

“1. This is a suit filed by the plaintiff who was an employee of the defendant. The contract of employment is a contract of private employment of the plaintiff with the defendant no.1 which is a private company and not a State under Article 12 of the Constitution of India.

2. A suit filed by an ex-employee such as the present plaintiff for salary and continuation of employment is clearly not maintainable and this issue has been a matter of decision by this Court in various judgments, last of which is the judgment in the case of *Shri L.M.Khosla Vs.Thai Airways International Public Company Limited and Anr.* CS(OS) 673/1997 decided on 1.8.2012.

3. In view of the above, *prima facie*, the suit is clearly not maintainable. Counsel for the plaintiff has been put to notice in this regard. Counsel for the plaintiff therefore wants to take instructions or argue the matter on the next date of hearing and on which date no adjournment shall be given.

4. In view of the aforesaid order, no orders are required to be passed for the present in the application being I.A.No.2629/2014 filed under Order 6 Rule 17 CPC which shows facts not only of employment of the plaintiff subsequent to the filing of the suit but also of the plaintiff having started his own business of security agency.

5. List on 23rd September, 2015.”

5. Today, counsel for the plaintiff states that the plaintiff has a right to seek the reliefs in the suit and therefore, the suit must be continued.

6. At this stage, let me refer to the admitted Clause 8 of the Employment Letter of the plaintiff dated 5.7.2002 and this Clause 8 reads as under:-

“8. After confirmation, if you wish to resign from the services of the Company, you will be required to give one month’s notice in writing or one month’s Basic salary in lieu thereof. Likewise the Company

may terminate your services by giving one month's notice or Basis Salary in lieu thereof." (underlining added)

7. A reading of the last line of the aforesaid Clause 8 of the Employment Letter shows that termination of employment can take place as a no fault termination by giving one month's notice or basic salary in lieu thereof. Once such a clause is there, at best the entitlement of the plaintiff will only be to one month's salary even assuming defendant is guilty of breach of contract in wrongly taking resignation from the plaintiff. That a plaintiff who is an employee of a private employer is only entitled to damages as specified in the contract of employment as has been held by the Supreme Court in the judgment in the case of *S.S. Shetty Vs. Bharat Nidhi Ltd. AIR 1958 SC 12*. The ratio of this judgment of the Supreme Court has been applied by me in the judgment in the case of *Shri L.M. Khosla Vs. Thai Airways International Public Company Limited and Anr.* CS(OS) No. 673/1997 decided on 1.8.2012. The relevant paras of this judgment are paras 2 to 8 of the said judgment and which paras read as under:-

"2. The plaintiff was an employee of the defendant No.1-company and he was terminated from the services of the defendant No.1-company by giving a one month's pay in lieu of one month's notice for termination of services. The plaintiff has filed the suit challenging his termination and has claimed various reliefs which are as under:-

“(A) To pass a decree for money awarding compensation to plaintiff and against defendants liable jointly and severally in the

sum of ` 71,81,306/- as claimed in para 26 above (detailed and digested in Annexure 'H' (COLLY) or such other amount as adjudged by Hon'ble Court together with interest pendente lite and future at a rate of 24% per annum or such rate as allowed by Hon'ble Court.

(B) To award such further amount of compensation ordered/evaluated in terms of enquiry ordered by Hon'ble Court relating to plaintiff's entitlement for salary level as prayed for in para 25 above.

IN ALTERNATIVE TO ABOVE:

To declare that plaintiff's employment as Manager Liaison and Customer Services with defendant company was not validly terminated by defendants under defendant No.2's letter dated 12.9.1995 (annexed as part of ANNEXURE 'G') and the same is illegal, invalid, void and a nullity alongwith declaring that the plaintiff's employment with defendant company is determinable only upon plaintiff attaining the age of superannuation viz. 58 years i.e. on the ending of 30.4.2004 with all benefits/entitlements in tact/attached thereto.

(C) To award costs of the suit in favour of plaintiff and against the defendants 1 and 2 liable jointly and severally.

(D) To pass such other or further orders as deemed just, fit and proper in the circumstances of the case."

3. The issues with respect to whether an employee under a private employment can file a suit seeking continuation of services with consequential benefits of pay etc and disentitlement of the employer to terminate the services have been decided by me in three judgments as under:-

(i) ***Shri Satya Narain Garg through his legal heirs Vs. DCM Limited and Ors.*** in RFA No.556/2002 decided on 5.12.2011.

(ii) ***GE Capital Transportation Financial Services Ltd. Vs. Shri Tarun Bhargava*** in RFA No.294/2004 decided on 20.3.2012. An S.L.P. against this judgment has been dismissed by the Supreme Court on 3.8.2012 in S.L.P. No.21723/2012.

(iii) ***Pawan Kumar Dalmia Vs. M/s. HCL Infosystems Ltd. and Ors.*** in RFA Nos.180/2004, 235/2004 and 239/2004 decided on 13.3.2012.

4. In the judgment in the case of *Shri Satya Narain Garg (supra)*, I have referred to the recent judgment of the Supreme Court in the case of *Binny Ltd. & Anr. Vs. V. Sadasivan & Ors. (2005) 6 SCC 657* and which holds that public policy principles or administrative law principles do not apply to private employment. The relevant paras in the judgment in *Shri Satya Narain Garg (supra)* read as under:-

“7. Merely because two views are possible, this Court will not interfere with the conclusion arrived at by the Trial Court, unless the conclusion is illegal or perverse or causes grave injustice. In case of private employment, the employers are fully justified in taking steps for termination of services, if it finds that the employee is not upto the mark. Principles applicable in public law domain do not apply with respect to employees in private employment. Employment in private sector is governed by the terms and conditions of employment, and unless the termination is shown to be violation of the terms and conditions of employment, it cannot be said that the termination is illegal. In the present case, in my opinion, since there was no fixed period of employment so far as the deceased plaintiff is concerned, the deceased plaintiff could have been terminated from services even by a simplicitor notice, assuming even if the services of the deceased plaintiff were upto the mark. Further, even if there is illegal termination of services, it is not possible to grant damages as claimed inasmuch as the principle of mitigation of damages squarely applies. As per this principle of mitigation of damages enshrined in Section 73 of the Contract Act, 1872 even if an employee is illegally terminated from services, he cannot sit at home and he must take sufficient steps to procure alternative employment. The law in this regard is contained in the judgment of the Supreme Court reported as *S.S. Shetty v. Bharat Nidhi Ltd., AIR 1958 SC 12*. Paras 12 and 13 of this judgment are relevant and the same read as under:

12. The position as it obtains in the ordinary law of master and servant is quite clear. The master who wrongfully dismisses his servant is bound to pay him such damages as will compensate him for the wrong that he has sustained.

"They are to be assessed by reference to the amount earned in the service wrongfully terminated and the time likely to elapse before the servant obtains another post for which he fitted. If the contract expressly provides that it is terminable upon, e.g., a month's notice, the damages will ordinarily be a month's wages..."

... .. No compensation can be claimed in respect of the injury done to the servant's feelings by the circumstances of his dismissal, nor in respect of extra difficulty of finding work resulting from those circumstances. A servant who has been wrongfully dismissed must use diligence to seek another employment, and the fact that he has been offered a suitable post may be taken into account in assessing the damages."

(Chitty on Contracts, 21st Edition, Vol (2), p. 559 para. 1040).

13. If the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured prima facie and subject to the rule of mitigation in the salary of which the master had deprived him. (Vide *Collier v. Sunday Referee Publishing Co. Ltd.*, 1940-4 ALL. E.R. 234 at p.237 (A). The servant would then be entitled to the whole of the salary, benefits, etc., which he would have earned had he continued in the employ of the master for the full term of the contract, subject of course to mitigation of damages by way of seeking alternative employment."

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9. Surely, these types of self-serving averments cannot be held as discharge of onus of proof of mitigation of damages. The statement made by the deceased plaintiff is bereft of any details as to which companies or firms or persons he applied to, and on which dates, and for what position, and for what salary and also the details as to why he could not obtain the alternative employment. I am, therefore, of the opinion that the deceased plaintiff, even assuming he was wrongly terminated from services, failed to prove that he had taken sufficient steps for mitigation of damages."

5. In the case of ***GE Capital Transportation Financial (supra)***, I have referred to the earlier judgment in the case of ***Shri Satya Narain Garg (supra)***, and also the fact that contracts which are determinable in nature cannot be specifically enforced as per Section 14(1)(c) of the Specific Relief Act, 1963. I have also referred to the fact that if the contract of employment provides for one month's notice, then, the maximum entitlement of damages of an employee who alleges illegal termination is one month's pay. Paras 10 to 12 of the judgment in the case of ***GE Capital Transportation Financial (supra)*** are relevant and the same read as under:-

“10. In fact, the subject suit was also barred by Section 14(1)(c) of the Specific Relief Act, 1963 which provides that the contract which is in its nature determinable, cannot be specifically enforced. I have referred to the fact that the contract was determinable by a one month’s notice as per clause 7 of the terms and conditions of the letter dated 21.4.1998 and therefore the contract which was determinable by one month’s notice cannot be specifically enforced. What cannot be done directly cannot be done indirectly i.e. if there cannot be specific performance of the contract, there cannot be declaration and injunction to continue such a service contract. Section 41(e) of the Specific Relief Act, 1963 provides that injunction will not be granted to prevent breach of the contract, performance of which could not be specifically enforced.

11. Therefore, looking at the matter from the point of view of the contract of personal service not being enforceable under Section 14(1)(b) of the Specific Relief Act, 1963, the contract being determinable in nature and hence cannot be enforced as per Section 14(1)(c) of the Specific Relief Act, 1963 or that injunction could not be granted to prevent breach of a contract which cannot be specifically enforced, the suit was clearly barred and not maintainable. The judgment of the trial Court does not refer to the binding provisions of Sections 14(1)(b), (c) and 41(e) of the Specific Relief Act, 1963. To complete the discussion on this aspect, I would once again refer to the recent judgment of the Supreme Court in the case of ***Binny Ltd. (supra)*** and which specifically provides that in private contracts i.e. in strict contractual matters, there does not arise the issue of applicability of Administrative Law principles.

12. I have already stated above that even presuming there was breach of contract, at best reasonable damages can be granted and once there is a clause for termination of services by one month’s notice, it can only be one month’s notice which can be treated as reasonable damages inasmuch as parties understood the period for obtaining of an alternative employment as a one month’s notice period- vide ***SS shetty’s case (supra)***”

As already stated above, an S.L.P. filed against this judgment has been dismissed.

6. In the present case, the plaintiff himself relies upon the terms and conditions of employment issued by the original employer

and then reconfirmed by the defendant No.1, in the letters dated 27.7.1970 and 30.9.1974. Defendant No.1 is the company which subsequently took over the original/erstwhile employer of the plaintiff. It could not be disputed that in terms of these letters the services after the probation period of the plaintiff can be terminated by giving one month's notice or one month's pay in lieu of notice. Since the letters containing the terms of employment are small letters and the terms are relevant, I seek to reproduce the same in entirety. These letters read as under:-

“

Mr. L.M. Khosla,
B-5/14, Model Town,
Delhi-9
27th July, 1970.

JS/IG

Dear Sir,

With reference to your application dated the 2nd June, 1970, and your subsequent interview, we have pleasure in confirming your employment with Scandinavian Airlines System, New Delhi in the capacity of the Documentation Assistant-cum-Reservation Clerk. Your employment will commence 1st August, 1970, subject to a three month probation period and medical examination.

Your salary during the probation period is fixed at ` 650/- (Rupees six hundred and fifty only) per month. On confirmation your salary will be ` 700/- (Rupees seven hundred only) per month.

The above salary is inclusive of all allowance and dearness except for fixed Housing Assistance Allowance which is in your case ` 45/- (Rupees forty-five only) per month.

If for any reason your services are terminated or you decide to terminate your employment during the probation period, either side will be entitled to give 24 hours notice and salary calculated on daily basis will be paid up to date of termination. After confirmation one month's notice from either side.

You will be entitled to eighteen working days leave per year. The time to be accepted by the Company, taking into consideration the convenience of work. You will also be entitled to join the Local Employees Provident Fund after completion of one year's continuation service.

Kindly confirm the above terms by signing and returning to us the copy hereof.

Yours faithfully,
SCANDINAVIAN AIRLINES

J. Svane-Christensen
District Manager.

XXXX	XXXX	XXXX	XXXX
Your ref.	Your letter	Our ref.	Calcutta
		SP/IP	30 September 1974

Dear Mr. Khosla,

This is to confirm that Thai International will take over from SAS the administrative responsibilities of this office as of October 01, 1974. As of same date you are thus in the employ of Thai International under the very same terms and conditions-including acquired seniority-as those now enjoyed by you during your employment with SAS.

Best regards,

Sven Palm
Area Manager”

It is not disputed before me that the defendant No.1 has given one month's pay to the plaintiff in lieu of the notice period of one month. Therefore, the plaintiff is not entitled to any other compensation or damages or moneys from the defendant No.1.

7. In the case of **Pawan Kumar Dalmia** (*supra*) observations similar to those made by me in the case of **Shri Satya Narain Garg** (*supra*) were made. Paras 15 and 16 of the judgment in the case of **Pawan Kumar Dalmia** (*supra*) are relevant and the same read as under:-

“15. Finally, I must add that even at best if the termination of services of Sh. Pawan Kumar Dalmia was a breach of contract, parties admittedly being governed by contractual

relations, the maximum effect of the so called illegal termination would have been an entitlement to salary of two months and admittedly the appellant-Sh. Pawan Kumar Dalmia on his own showing has received salary till May, 1999. In any case, the complete statement of account with respect to full and final settlement was given vide Ex.DW1/4 dated 15.7.1999. I cannot agree with the arguments as raised on behalf of the appellant that this letter dated 15.7.1999 was not served on the appellant/plaintiff inasmuch as this letter is accompanied by the AD card which shows receipt of the postal article by a person one "Sarita". It is not disputed that the letter dated 15.7.1999 has been sent to the correct address by the postal department, and therefore, defendant No.1/respondent No.1 discharged the onus of proof by filing the AD card. If the appellant wanted to dispute the receipt of the letter dated 15.7.1999, onus of proof was upon him to summon the record from the post office to show that there was no delivery of article at the stated address, however, the appellant did not do so, and would not have done so inasmuch as the stand that the registered letter dated 15.7.1999 was not received was a stand which was false to his knowledge inasmuch as the letter dated 15.7.1999 has been sent to the admitted address of the appellant, and which is also the address being the self-leased premises. In view of the aforesaid, the judgments in the case of ***Green View Radio Service (supra)*** and ***Dinanath Shantaram (supra)*** therefore do not have application to the facts of the present case. Merely denying by the appellant/plaintiff that he has no family member of the name of 'Sarita' is neither here nor there as such a person 'Sarita' could have been a servant or any other person found or otherwise living at the address which is admittedly the address of the appellant/plaintiff.

16. The judgments cited on behalf of the appellant in the cases of ***Jyotsna Raina (supra)*** and ***Municipal Corporation of Delhi (supra)*** will not apply inasmuch as the employment in this case is a contractual employment and is not a statutory appointment or an employment under a statutory corporation or a company which is "state" under Article 12 of Constitution of India. The issue of a person being terminated by an authority inferior to the person who appointed such person is relevant in proceedings under Services Law or where there is an issue of violation of Article 14 of the Constitution, but definitely not in employments which are contractual employments and governed

by contractual terms and conditions. In any case, Board of Directors is a superior authority than a Chairman of a company and hence in the present facts it is not that termination can be said to be by an inferior authority to the appointing authority. The judgment in the case of *Haryana Seeds Development Corporation (supra)* also has no application to the facts of the present case inasmuch as in the said case, the Court was concerned with termination of services of a Company Secretary by a Managing Director and not by the Board of Directors as has been done in the present case. In fact, a reference to the judgment in the case of *Haryana Seeds Development Corporation (supra)* shows that Board of Directors of a company can surely terminate the services of a Company Secretary. Trial Court has also referred to and rightly distinguished this judgment in para 26 of the impugned judgment reproduced above. The judgment relied upon in the case of *Amal Kumar Mukherjee (supra)* with respect to the argument that the minute book of a company ought to be bound and written in hand, is to be read in the context of the facts of the said case wherein there were disputes inter se shareholders of a company and in such circumstances, the issue had arisen with respect to manipulation of the minute book of the company. In the present case, there is no dispute inter se shareholders or inter se Directors of the Board of the company and therefore the judgment in the case of *Amal Kumar Mukherjee (supra)* will have no application to the facts of the present case, especially for the reasons stated above that there is no subsequent resolution of the Board of Directors or any resolution in the General Body meeting of defendant No.1/respondent No.1-company questioning or rescinding the termination of services of the appellant-Sh. Pawan Kumar Dalmia.”

8. In view of the aforesaid judgments, the following conclusions in law emerge:-

(i) A contract of private employment is not similar to the public employment and in such private employment there is no scope of applicability of the principles of administrative law/public law.

(ii) A contract of employment which provides termination of services by one month's notice, then, at best the employee will only be entitled to one month's pay in terms of the employment contract. An employee is not entitled to any relief of continuation

in services or pay with consequential benefits for alleged remaining period of services till the date of his superannuation.

(iii) As per the provision of Section 14(1)(c) of the Specific Relief Act, 1963, a contract which is determinable in nature cannot be specifically enforced. Since the service contract in the present case is determinable by one month's notice there does not arise the question of giving of any reliefs which tantamount to enforcement of a determinable contract. As per Section 14(1)(b), a contract of personal service cannot be enforced when the employer is not the Government or "State" as per Article 12 of the Constitution of India.

Plaintiff has in fact received one month's pay and therefore his claim will stand satisfied in law and he is not entitled to any reliefs as prayed for in prayer clauses in the suit." (emphasis is mine)

8. In the present case, as per the written statement filed by the defendant, it is seen that the plaintiff had taken loans from the defendant and as on 6.7.2004 a sum of Rs.1,21,164.83/- was due to the defendant. Plaintiff instead of being given only one month's salary, was given three months' basic salary amounting to Rs.1,03,099/- and even after this adjustment plaintiff still owes a sum of Rs.17,175.18/- to the defendant.

9. In view of the above, plaintiff is not entitled to declaration and injunction with respect to continuing of his services with the defendant or any damages being paid by the defendant to the plaintiff or the other related reliefs claimed in the plaint as not only the due compensation as per law is paid but also that such a contract for personal service, and that too determinable as per a notice period, cannot be specifically enforced.

10. In view of the above, the suit is clearly misconceived and the same is dismissed with costs. Defendant will file certificate of costs incurred for this suit in terms of the fees payable by the defendant to its advocates and such costs towards fees will be the costs of the suit in favour of the defendant and against the plaintiff. The certificate of fees by the defendant will be supported by the certificates of lawyers of having received the fees from the defendant. Decree sheet be prepared.

SEPTEMBER 23, 2015
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VALMIKI J. MEHTA, J.