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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No. 393/2010

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NOVEMBER 5, 2015

SHRI NARESH KUMAR

..... Plaintiff

Through

Mr. Shashank Shekhar, Advocate
with Mr. R.K. Dubey and Ms.Ranjita,
Advocates

versus

SHRI HIROSHI MANIWA & ORS

..... Defendants

Through

Mr. Mukul Talwar, Sr. Advocate
along with Mr. Aman Bhalla,
Advocate for D-1 to D-7
Mr. Rajmangal Kumar, Advocate
with Ms. Sushma Yadav and
Mr.Aman Singh, Advocates for
Mr. S.K. Dubey, Adv. for D-8 & 9

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. In this suit on 15.10.2015 the following Order was passed:-

“1. The present suit is filed by the plaintiff who was an employee of the defendant no.7-NYK Line (India) Limited. Plaintiff has filed the present suit for recovery of monies alleging his illegal termination. In effect, plaintiff seeks damages for loss of employment opportunities and other related reliefs.

2. The plaintiff has filed his employment letter dated 15.10.2007 issued by the defendant no.7 company and which

contains clause 17(a) entitling either parties by three months' notice or salary of three months in lieu of such notice to terminate employment.

3. In view of the above, clearly the plaintiff can only be entitled to the salary of three months, even if there is an illegal termination, as held by the Supreme Court in the case of *S.S. Shetty v. Bharat Nidhi Ltd.*, AIR 1958 SC 12. I have also considered this aspect in the case of *L.M. Khosla v. Thai Airways International Public Company Limited & Anr.*, CS(OS) No.673/1997, decided on 01.08.2012.

4. Counsel for plaintiff is therefore put to notice that the suit is not maintainable and he seeks time to examine this issue.

5. List on 5th November, 2015.”

2. A reading of the aforesaid order shows that employment of the plaintiff was a private employment and was not a public employment which is protected like an employment with a State or an arm of a State as per Article 12 of the Constitution of India. The employment letter of the plaintiff by the defendant no.7/employer dated 15.10.2007 contains Clause 17(a) entitling termination of the employment of the plaintiff by a notice period of three months or salary of three months. This Clause 17(a) reads as under:-

“17. Termination:

Your employment hereunder may be terminated as per Company Policy:

(a) by either party hereto giving the other three (3) months' notice in writing of termination, or by paying to the other party three (3) months' salary in lieu of such notice; or

(b) by the Company without notice or payment in lieu of notice in the event of serious misconduct or persistent unpunctuality, neglect of duty or breach of any rules or regulations of the Company on your part or if you commit any material breach of any of your duties or obligations hereunder

On the termination of your employment hereunder you shall forthwith deliver to the Company all books, documents, papers, materials and other property of or relating to the business of the Company which may then be in your possession or under your power or control.

Termination of your employment hereunder shall be without prejudice to any rights, which have accrued prior to termination.”

3. In view of ratio of the judgment of the Supreme Court in the case of *S.S. Shetty Vs. Bharat Nidhi Ltd., AIR 1958 SC 12* it is clear that even if there is an illegal termination of an employee by a private employer, at best the employee is entitled to the salary for the notice period. I have had an occasion to deal with the ratio in the judgment in the case of *S.S. Shetty (supra)* in various cases and the last of such cases is the case of *L.M. Khosla Vs. Thai Airways International Public Company Limited & Anr., CS(OS) No.673/1997*, decided on 01.08.2012. The relevant paras, i.e paras 2 to 8, of *L.M. Khosla's* case (*supra*) 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 Rs. 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 pendent 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 along with 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

JS/IG

27th July, 1970.

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 Rs. 650/- (Rupees six hundred and fifty only) per month. On confirmation your salary will be Rs. 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 Rs. 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.

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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)

4. It is therefore clear that the plaintiff cannot claim illegality of termination of his employment either for continuing the employment or for claiming any monetary amount as if he had continued in employment with the defendant no.7.

5. In this suit the following are the relief clauses:-

"A. Decree of Declaration declaring that the Termination letter dated 07.08.2009 is illegal and bad in law;

B. Pass a Decree in favour of plaintiff and against defendants for a sum of Rs. 1,00,00,000 as damages for loss of reputation, loss of goodwill, loss of employment opportunities and causing mental agony and distress to plaintiff by terminating him illegally and defamation caused to him by indulging into character assassination through public notice.

C. Decree of Declaration Declaring the Due Diligence Report prepared by the Defendant No.8 & 9 qua the Plaintiff as Null and Void and consequentially grant exemplary damages for preparing a fabricated and false report.

D. Award pendent lite and future interest @ 18% from the date of filing of this suit till the realization,

E. Cost; &

F. Any other order/orders as this Hon'ble Court may deem fit and proper in the facts of the present case."

6. In view of the above discussion pertaining to the ratio of the judgment of the Supreme Court in the case of *S.S. Shetty (supra)*, there cannot be granted relief to the plaintiff of declaring the termination of the plaintiff as illegal and void inasmuch as even if the termination is illegal and void, then, at best the plaintiff is entitled to three months' salary for the notice period and which can be the only maximum liability upon the defendant no.7. Thus the only relief which the plaintiff is entitled to is that he would be paid three months' salary which was due to the plaintiff as on the date of his termination vide Letter dated 07.08.2009, and accordingly, the defendant no.7 is directed to pay three months' salary to the plaintiff w.e.f the date of the Termination Letter dated 07.08.2009 along with interest @ 9% p.a. simple till payment. In case payment is not made within a period of three months, the rate of interest thereafter will become 18% p.a. simple.

7. Learned counsel for the plaintiff argued that reliefs in the prayer clauses of this suit are different than in the case before the Supreme Court in *S.S. Shetty (supra)* or even from the facts of the case decided by this Court in *L.M. Khosla (supra)* and therefore the suit is maintainable, however, I note that though part of the prayer clause talks of grant of damages for loss of reputation and goodwill on the ground of defamation, in the plaint there are no bundle of facts constituting a cause of action as to how plaintiff has been defamed or plaintiff has suffered loss of reputation and goodwill. Where relief is sought on the basis of the alleged defamation or loss of goodwill of the plaintiff with respect to any defamation or any alleged character assassination, there has to be entire set of facts which are required to be stated in view of Order VI Rule 4 of the Code of Civil Procedure, 1908 for claiming any damages with respect to defamation or character assassination or loss of goodwill. I asked the counsel for the plaintiff to show me that if and what was the public notice issued in the newspaper by the defendant no.7 defaming the plaintiff and as is orally argued before me, but the counsel for the plaintiff could not point out to me any averment made in the plaint that a particular notice of a particular date in a particular newspaper or other publication was issued by defendant no.7 and which amounts to defamation and character assassination of the

plaintiff. A bland statement made in the plaint, including in the relief clause, of loss of goodwill and reputation thus cannot be a basis for grant of damages for alleged defamation, loss of goodwill and reputation as the plaint lacks averments to constitute such a cause of action. The plaint therefore lacks the cause of action for grant of damages on such basis and therefore damages cannot be granted to the plaintiff. It also bears note that in a suit for claiming damages by defamation, plaintiff must make averments as to how the plaintiff has been brought down in the estimation of right thinking members of the society, but even that this averment has been made in the plaint could not be pointed out to this Court on behalf of the plaintiff. Really, therefore, plaintiff has no case for claiming damages for defamation or alleged character assassination of the plaintiff. Finally, while on this aspect it is noted that if there is an illegal termination, and the remedy as per law is the three months' salary in lieu of the period of notice, then, for such aspect there cannot be a claim in law with respect to damages on the ground of mental agony and distress inasmuch as by law the monetary benefits are limited to the notice period of termination.

8. In view of the above, there is no merit in the suit, and the same is therefore dismissed except to the extent of directions issued to the

defendant no.7 to pay to the plaintiff three months' salary due on the date of Termination Letter dated 07.08.2009 along with interest @ 9% p.a. simple within a period of three months from today and if this amount is not paid within three months from today, then, the rate of interest payable by the defendant no.7 to the plaintiff would become @ 18% p.a. simple till payment.

9. Payment can be made by the defendant no.7 either directly to the plaintiff or by giving a pay order in the name of the plaintiff to the counsel for the plaintiff who is appearing before this Court today.

10. Parties are left to bear their own costs. Pending applications are also accordingly disposed of.

NOVEMBER 05, 2015
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VALMIKI J. MEHTA, J