

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19.10.2015
Pronounced on: 23.12.2015

+ CS(OS) 1363/2006

SHRI G.S. PAUL Plaintiff

Through: Mr. G.D. Tehri, Advocate

versus

M/S ESYS INFORMATION TECHNOLOGY LTD EF+
..... Defendant

Through: None

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. The plaintiff seeks recovery of Rs.2,12,80,000/- on account of arrears of salary and damages etc. along with interest @ 15% per annum till realization of the amount.
2. It is plaintiff's case that he has been engaged by Defendant on contract for a period of three years under the following terms:

“Employment Agreement

Dear Mr. Paul,

*We are pleased to offer you the full time position as **Country Manager / Chief Executive – India Operations** with eSys Distribution Limited India. Your employment is effective from the day of joining duties in New Delhi, before 10th November 2002. The following is designed to serve as a record of the essential terms and conditions of your employment, which, we trust, are in accordance with our discussions.*

1. You shall be responsible for managing and developing component distribution business in India for **eSys Distribution Group**, its subsidiaries and related companies in India. It also include the current organization of eSys Distribution in India.
2. As the Management Cadre of the Company you shall perform the duties of an executive commensurate with such position, shall diligently perform all services as may be reasonably assigned to you by the Company and shall exercise such power and authority as may from time to time be delegated to you by the Company. You shall devote substantially all of your full working time and attention to the business and affairs of the Company, render such services to the best of your ability, and use your best efforts to promote the interests of the Company.
3. Your services shall be considered confirmed upon joining, which is subject to quarterly review of the business plan and achievements. Company reserves the right to terminate the employment. A notice of 2 months shall be served or Salary in lieu of the notice period shall be paid. You can also terminate the employment by serving a notice period of two months.
4. You salary and remuneration shall be as per the annexure A' enclosed herewith.
5. You will be entitled to the following additional benefits.
 - 14 days of paid **Vacation Leave** per year to be utilized for vacation and any other leave of absence.
 - If you use this in a block exceeding 2 days, prior permission from the reporting authorities is necessary.
 - Medical benefits as covered by the group Medical Insurance Policy for self.
6. XXX
7. XXX
8. XXX
9. XXX
10. XXX
11. It is agreed that it shall be open to the management

from time to time, to act, modify or abrogate any remuneration, benefit, facility or perquisites that may be extended to you on review of Company's functioning finances and prospects upon mutual agreement. A notice of 30 days be given before implementing any such changes.

12. *You will be required to abide by the administrative instructions and rules regulations as in force from time to time for the effective and smooth working of the organization.*

13. *The Employee shall not be entitled to assign any of his rights or obligations under this Agreement.*

14. *You may also be required to serve on the board of directors of the company and sign necessary resolutions, guarantees and such instruments required in the normal course of the business.*

15. Severability: *The invalidity of any one or more of the words, phrases, sentences, clauses of sections contained in this letter shall not affect the enforceability of the remaining portions of this Agreement or any part thereof, all of which are inserted conditionally on their being valid in law, and in the event that any one or more of the words, phrases, sentences, clauses or sections contained in this Agreement shall be declared invalid, this Agreement shall be construed as if such invalid word or words, phrase or phrases, sentence or sentences, clause or clauses, or section or sections had not been inserted. If such invalidity is caused by duration, geographic scope or both, the otherwise invalid provision will be considered to be reduced to a period of area which would cure such invalidity.*

16. Waivers: *The waiver by either party hereto of a breach or violation of any term or provision of this Agreement shall not operate nor be construed as a waiver*

of any subsequent breach or violation.

You are requested to sign and return the duplicate copy of this letter as token of your acceptance of the terms and conditions of your employment as stated herein above.

*We are pleased that you have chooses **eSys Distribution** and we sincerely hope that we will provide you with the opportunity and challenge you look forward to your career. We wish you good luck in your new assignment and extend a warm welcome to our organization.*

*For **eSys Distribution Ltd.** Agreed to and accepted
with
the express intent to be legally
bound*

sd/- NEERAJ CHAUHAN sd/-

September 12, 2002 G S Paul

3. Mr. G.D. Tehri, the learned counsel for the plaintiff, submits that the plaintiff had assisted the defendant to set up a business of Information Technology products and supplied computer hardware to the defendant-company's clients all over the country. The plaintiff was initially engaged as Chief Executive Officer (CEO) of the defendant-company in the year 2002 and because of his exemplary work, he was promoted to the post of Managing Director (MD) on 01.07.2003 for a period of three years ending on 30.6.2006. A resolution in this regard dated 14.07.2003 (Ex. P-15) was passed in the Extra-Ordinary General Meeting (EGM) held at the office of the company. It is, however, claimed that the plaintiff had been discharging duties of both the MD as

well as the CEO of the defendant. The terms of engagement also envisaged payment to the plaintiff of 5% of net profits, before taxes.

4. It is claimed that on 12.05.2004, the plaintiff was directed to attend the EGM on 12.05.2004, during which a resolution was passed for termination of his services, albeit without any valid reason or explanation. He was not afforded an opportunity to either speak or make any representation against this termination of the service; that by a letter of the same date (Ex. P-7) from Mr. Ved Prakash, Director of the defendant-company, the plaintiff's employment as MD was terminated. It is claimed that till that date, the plaintiff had set up 20 branches of over country and had developed a strong network of sales outlets. As a result, the turnover of the company increased to about Rs. 500 crores by the time he was asked to leave the company. All this was accomplished by the plaintiff in a short span of two and a half years.

5. The plaintiff has led evidence by way of affidavit to support his case. During his cross examination, he has reiterated that his Employment Agreement (Ex. P-1) included a payment of Rs.18 lakhs per annum plus a bonus equivalent to 5% of the net profits of the company before taxes, from the second year of his employment, which was verbally committed to him by the defendant. Hence, the total package was somewhere between Rs. 50-70 lakhs per annum.

6. The learned counsel for the plaintiff submits that the plaintiff was discharging his duties in the capacity of CEO and MD; that his removal from the position of Managing Director of the company was done without following due procedure as per the Companies Act, 1956 and was thus illegal.

7. The learned counsel further submits that the plaintiff was removed from the position of MD but was never removed from the position of CEO, therefore, he is entitled to be paid for the entire tenure of three years. The plaintiff claims that in the Information Technology industry, termination of employment and services, especially at the higher managerial level, carries with it an abhorrent stigma, and therefore, his removal from the position of MD has also irreparably damaged his reputation and affected his career; his prospective employability and well being in the Information Technology industry has been perpetually compromised and would need to be compensated with damages.

8. The plaintiff sent a legal notice dated 24.2.2006 to the defendant. His claim of Rs. 2,12,84,743/- is broken up in the following manner:

Towards salary and other allowances:	Rs. 45,69,743/-
Towards bonus @ 5% of net profits:	Rs. 67,15,000/-
Towards damages for mental torture and loss of reputation:	Rs. 1,00,00,000/-

9. However, the plaintiff has not led any evidence to substantiate his claim with respect to the profits made by the defendant-company. Further, the claim of Rs. 1 crore cannot be granted since there is nothing on record by way of evidences or documents to substantiate it.

10. The learned counsel for the plaintiff submits that from the date of the plaintiff's removal from employment to the date of expiry of the contractual term of employment, he is entitled to payment of the emoluments envisaged in the Employment Agreement for the entire tenure. In support of his arguments he relies on the following

judgments:

1. ***M/s Indian Rly. Contruction Co. Ltd. & Ors. v. Late Col. A.K. Dogra*** 50 (1993) DLT 200 (DB)

(7) *The first question which arises for determination is whether the said appellant could terminate the services of the respondent before his term of appointment expired without assigning any reason. It is well settled that executive action must be informed by reason and must not be arbitrary as arbitrariness is opposed to the principle of equality enshrined in Article 14 of the Constitution, This glorious and glittering facet of Article 14 of the Constitution was unraveled in E.P. Royappa Vs . State of Tamil Nadu (1974)ILLJ172SC , and since then it has found expression in several decisions. (See:Mrs. Maneka Gandhi Vs . Union of India : [1978]2SCR621 , Ramana Dayaram Shetty Vs . The International Airport Authority of India : (1979)IILLJ217SC , M/S. Kasturi Lal Lakshmi Reddy Vs . The State of Jammu and Kashmir : [1980]3SCR1338 and Haji T.M. Hassan Rawther vs . Kerala Financial Corporation : [1988]1SCR1079 . A recent decision of the Supreme Court in Kumari Shrilekha Vidyarthi Vs . State of U.P. : AIR1991SC537 is also instructive. In this case the services of the public prosecutors were terminated en masse by the State of U.P. The Supreme Court while considering the validity of the omnibus termination.*

(9) *Reverting to the case in hand it is clear that while terminating the service of the petitioner no reason has been given by the appellant except that his services were no longer required. We are not persuaded by the submission of the learned counsel for the appellant that no reasons were required for terminating the appointment of the petitioner as the same was based on contract. Even where the appointment is the result of a contract between the parties and one of the parties is an instrumentality of the State, the tenure of an employee cannot be cut short or brought to an end arbitrarily, at the whim and caprice, of the employer before the expiry of the period of his contract. There must exist adequate reasons for bringing to an end the services of an employee before the contractual period expires.*

2. K.G. Hiranandani Vs. Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. AIR 1969 Bombay 373

5. Having construed the relevant statutory provisions in the preceding paragraph, I will now proceed to deal with the rival contentions of the parties. It is the contention of Mr. Daji that in cases of breach of a contract of service, damages are never given for the full remaining term of service, but that they have been given by Courts only for a reasonable period or for a reasonable period of notice. It is further contention of Mr. Daji that, in any event, there was a duty on the plaintiff to mitigate damages, that the onus of proving what efforts he made to obtain alternative employment is on the plaintiff, and that the evidence that the plaintiff, and that the evidence that the plaintiff has given on the point shows that he has really made no efforts whatsoever to mitigate damages the onus which according to Mr. Daji, lies upon him. As far as the first proposition that in cases in which the contract of employment was for a fixed period, the normal measure of damages would be the salary for the whole of the unexpired period of service. The cases cited by Mr. Daji were all cases in which there was no fixed term of employment for a fixed term, damages have been given for a shorter period, as being the normal measure apart. It is not necessary for me to deal with each one of the cases on which Mr. Daji has relied, but I may refer to three of them to show that the principle of awarding damages for a reasonable period or reasonable period of notice comes into play only when the contract of employment is not for a fixed term. The case of Sree Minakshi Mills Ltd. v. [Anantrama Ayyar](#) : AIR1930Mad654 was cited by Mr. Daji. The statement at p. 658 in the judgment in the said case that the Court had after all to see in each particular case what time may reasonably be expected to elapse before a person wrongfully dismissed can secure a similar employment, must be read in the context of the facts of that case which show clearly that the employment was not for a fixed term. It may be mentioned that it was observed in the said judgment that the doctrine of reasonable time that is the time during which a fresh employment may reasonably be obtained,

and that both the principles come to the same thing. No question of reasonable notice can possibly arise in the case of a contract for a fixed term, and it is, therefore, clear that the principle laid down in the said case has no application to a case like the present one in which the contract was admittedly for a fixed term of five years. Mr. daji has also relied upon a decision of the Calcutta High Court in the case of Prafulla Ranian v. [Hindusthan Building Society Ltd.](#) : AIR1960 Cal 214 , but the facts of the said case show clearly that the plaintiff's employment as the secretary of the defendant was for an indefinite period terminable by reasonable notice, and it was on those facts that the Court proceeded to hold that the plaintiff was entitled to 9 month's salary in lieu of notice by way of damages. Mr. Daji also cited a decision of the High Court of Travancore-Cochin in the case of Thomakutty v. Thomas. AIR 1954 Trav-co 104 in which also it is clearly stated in the judgment, para 7, that the appointment of the plaintiff as permanent teacher did not mean that the tenure of office was guaranteed for any definite period, and that the word "permanent" in the appointment order was used merely in antithesis to the words "acting" or "temporary". It was on those facts that the Court held (paragraph 17) that the service could only be terminated after reasonable notice, except where the dismissal was for proved misconduct or for other justifiable causes, and that the period of the notice would ordinarily be fixed as the time during which a fresh employment might reasonably be expected to be obtained, and awarded to the plaintiff (paragraph 20) twelve months' salary as and by way of damages. No useful purpose would be served by my discussing any of the other cases cited by Mr. Daji which can be served by my discussing any of the cases cited by Mr. Daji which can be distinguished on precisely the same grounds as these three cases. As against those cases, there is a vast array of authority laying down that the normal measure of damages in the case of breach of a contract of employment for a fixed term is the salary for the whole of the unexpired period of service. It would be convenient to refer at the outset to the decision of the highest Court on the point, and that is the decision of the Supreme Court in the case of S. S. Shetty v. [Bharat Nidhi Ltd.](#), : (1957) IILLJ696SC in which Bhagwati, J. delivering the

judgment of the bench, laid down (paragraph 13) that 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 and deprived him. Bhagwati J. then proceeded to lay down in the same paragraph that the servant would, in that event, be entitled to the whole of the salary, benefits etc., which he would have earned had he continued I the employ of the master for the full term of the contract, subject for the full term of the contract, subject of course, to mitigation of damages by way of seeking alternative employment. The appellant in that case had taken up service with the respondent, but was discharged on the pleas that he had become surplus to the requirement of the Respondent company. On adjudication by the industrial tribunal, his discharge was held to be illegal and the appellant was ordered to be reinstated within a month of the date of the publication of the award. The respondent having failed to reinstate the appellant, the appellant claimed Rs. 47,738 as compensation on account of the pay he would have earned till his 55th year of age. The Supreme Court took the view (paragraph 22) that, having regard to the terms and conditions of the appellant's service, it was possible for the respondent had been found which the respondent to terminate the service of the appellant by paying him one month's salary in lieu of notice, but that in view of certain unfair practice of which the respondent had been found guilty, that right, which the respondent would have had, could not be availed of by the respondent and, having regard to all these factors. the Supreme Court came to the conclusion (paragraph 24) that it would be reasonable to compute the benefit of reinstatement which was awarded to the appellant at the amount of Rupees 12,500. Though, therefore, this was not a case of an employment for a fixed term, the Supreme Court, in discussing the law on the point, has made (paragraph 13) the observations to which I have referred above. it is too well settled to need authority that even he obiter dicta of the Supreme Court are entitled to the highest respect at the hands of all Courts in this country and should be accepted as law. : AIR1959Bom320 , unless they are in the nature of mere passing observations. In

view of the law as laid down by the Supreme Court in the said case, it is really unnecessary for me to refer to any other authorities on the point. I may, however briefly cite some of them. The same principle has been laid down earlier by a Division Bench of this Court in the case of *Gokak Municipality v. Rajaram Shridhar* 42 Bom LR 886 : AIR1940Bom386 though that was also a case in which there was no contract to employ the plaintiff for a definite period. In the case of *Sundaram v. Chokalingam* : AIR 1938 Mad 672, however, the contract of employment was for a fixed term of three years and was terminated before the expiry of that period, and it was laid down by a Division Bench of the Madras High Court at p. 674 that, where the employment was bound to pay the stipulated salary for the full period, unless he showed that the discharged servant had an opportunity of other employment but refused to avail himself of it, and that as it had not been shown that he appellant could have obtained other employment, he was entitled to payment from the date of wrongful termination of his service till the expiry of the full period of three years. This decision of the Madras High Court has been followed by Hidayatullah C. J. in case of *Trimbak Gopal v. Akola Education Society*. : AIR1957MP144 in which also the employment was for a fixed term viz. from 15th June 1950 to 31st March 1951, and it was held that it could not be terminated before the expiry of that period, unless the employee was at fault, and that where the employment was for a definite period, the employer was bound to pay the stipulated salary, unless he showed that the discharged servant had an opportunity of other employment, but refused to avail himself of it. The same proposition in regard to the measure of damages for the wrongful dismissal of an employee for a fixed term is to be found in standard works on the subject. In *Mayne on Damages* (12th edn.) Para 608, it is stated that the plaintiff would have earned had the employment continued according to the contract, subject to a deduction in respect of any amount which the plaintiff in minimising damages either had obtained or should reasonably have obtained. The learned author, however, proceeds to point out that whereas in the case of sale of goods the general rule in regard to measure of damages is the difference between the

contract price and the market price at the date of the breach, in the case of the breach of a contract for wrongful dismissal prima facie the measure of damages is the contract price, which is all that the plaintiff needs to show, subject to mitigation by the plaintiff, the onus of showing that the plaintiff, has or should have obtained alternative employment being on the defendant. It is further stated (para 609) that basically, the amount that the plaintiff would have earned under the contract is the salary of the wages which the defendant had agreed to pay. In Chitty on Contracts (22nd edn.) Vol, 2. para 1141, the rule is formulated in the same terms. In Halsbury's Laws of England (3rd edn.) Vol. 11, p. 244 para 414, it is stated in somewhat more specific terms that the measure of damages for wrongful dismissal, is the loss thereby incurred, and that would, subject to the duty of the plaintiff to mitigate, normally be the wages due and payable for the agreed period of service. In Sarkar on the Law of Master and Servant (1939 edn.) at page 243, it is stated that "in actions for wrongful dismissal, the general rule is that the plaintiff may recover damages for the whole unexpired period of service", except in cases where it is provided that the agreement might be terminated at an earlier date by giving previous notice. in view of these clear authorities on the point, I have no hesitation in holding, as I do, that in the case of a contract of employment for a fixed period, the normal measure of damages is the salary for the whole of the unexpired period of service.

3. In Re: Ruttonjee and Co. Ltd. AIR1969 Ca 1550

“38. Assuming that by virtue of Section 284 even permanent directors may be removed; it is to be observed that the power which is given to a Company under this Section is not an absolute or an unrestricted power. The legislature has provided for adequate safeguards against arbitrary or unreasonable exercise of this power. Sub-section (2) of the Section 284 provides that special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the

meeting at which he is removed. Sub-section (3) of Section 284 says that on receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the Company) shall be entitled to be heard on the resolution at the meeting. Sub-section (4) of Section 284 prescribes that where notice is given of a resolution to remove a director under this section and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so: (a) in any of the resolution given to members of the company, state the fact of the representations having been made; and (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company); and if a copy of the representations is not sent as aforesaid because they are received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting; provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter, and the Court may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

3. 39. I have elaborately set out the above provisions just to show that to remove a director under Section 284 certain essential requirements are to be fulfilled. The director concerned must

be given a reasonable opportunity to make representations against the proposal for his removal and the share-holders of the company should also have adequate opportunities of being acquainted with such representations before they subscribed to a resolution for removal.”

Clause 3 of the Employment Agreement dated 12.09.2002 reads as under:

“3. Your services shall be considered confirmed upon joining, which is subject to quarterly review of the business plan and achievements. Company reserves the right to terminate the employment. A notice of 2 months shall be served or Salary in lieu of the notice period shall be paid. You can also terminate the employment by serving a notice period of two months.”

11. The learned counsel for the defendant submits that as per the above clause, the said money in lieu of the notice period of two months terminating the services of the plaintiff was paid to the plaintiff.

12. The Court would note that as per Clause 3 of the Employment Agreement, the employment was terminable on a notice of two months or salary in lieu of the notice period. The employment was also subject to quarterly review of business plan and achievements and the company reserved the rights to terminate the employment. The plaintiff was served the notice and also paid the requisite monies, therefore the contention that the notice was not terminable prior to the expiry of the entire tenure of the agreement is belied from the records.

13. Furthermore, Clause 14 of the Employment Agreement envisaged the plaintiff to serve on the Board of Directors of the Company and sign

necessary resolutions, guarantees and such instruments required in the normal course of the business. Serving on the Board of Directors could be in the capacity of either as a Director or Managing Director. Therefore, the appointment of the plaintiff as the Managing Director was fully covered within the Employment Agreement and no additional monies were payable for the same except that as per Annexure-A (Ex. P-2), it had been agreed between the parties that:

“From the Second year onwards it is agreed that a profit sharing mechanism shall be worked out where you shall be entitled to a bonus equivalent to 5% of the net profits (before taxes) of the business developed under your leadership and initiative.”

The suit was filed on 30.05.2006. The period to be reckoned for the purpose of determining the 5% amount payable to the plaintiff would be the three years preceding it. However, except for the legal notice dated 24.02.2006 (Ex. P-8) claiming an amount of Rs.67,15,000/- towards commission @ 5% on profit and estimated profit for the year 2004-2005 and 2005-2006 (till 30.06.2006), there is nothing on record to show that the amount which is being claimed towards this commission @ 5% is made out. There is no evidence led in this regard. There has been specific denial of the said claim in para 14 of the defendant's reply dated 13.03.2006 (Ex. P-9) to the aforesaid legal notice dated 24.02.2006.

14. This Court is of the view that insofar as allegations in respect of the deviation from rules governing companies is concerned, the matter would lie before the Company Law Board. For the issue relating to

termination of services as CEO, the Employment Agreement dated 12.9.2002 would be relevant.

15. In the circumstances, the Court does not find persuasive evidence to grant any relief sought in the plaint. The termination of service was as per the contract, hence, claims towards basic salary, monthly allowance, yearly reimbursement, gratuity, earned leave, damages etc. are not made out. The claim towards damages also is not substantiated since the termination of service was as per the Employment Agreement.

16. Accordingly, the suit is dismissed.

NAJMI WAZIRI, J

DECEMBER 23, 2015/hkaur/acm/nrk