

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

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Date of decision: 10th August, 2015

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RFA No. 368/2005

SANJAY KUMAR BHAMBRI

..... Appellant

Through: Dr. L.S. Chaudhary with Mr. Ajay
Chaudhary, Advs.

Versus

UOI & ORS.

..... Respondents

Through: Ms. Leena Tuteja, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the *ex parte* judgment and decree dated 18th January, 2005 of the Court of Sh. N.K. Kaushik, Additional District Judge, Delhi of dismissal of suit No.326/2003 filed by the appellant for recovery of damages of Rs.8,67,240/- from the respondents Union of India and Mahanagar Telephone Nigam Ltd. (MTNL).
2. The appeal was admitted for hearing and the Trial Court record requisitioned. The counsels have been heard.
3. The appellant instituted the suit, pleading:

- (i) That he joined services under the Tele-Communications Commission, Department of Tele-Communications, New Delhi as Phone Inspector on 20th August, 1983;
- (ii) That he was subsequently, on the basis of Limited Competitive Examination, appointed as a Junior Telecom Officer with effect from 20th August, 1996,;
- (iii) That on 29th October, 1997, Telecommunication Consultants India Ltd. (TCIL) invited applications for working on deputation basis and the appellant submitted his application dated 20th November, 1997 which was forwarded by his immediate Controlling Officer and the concerned Deputy General Manager to the Chief General Manager of the respondent MTNL;
- (iv) However the said application was not forwarded to TCIL for consideration on the ground that a disciplinary action was contemplated against the appellant;
- (v) That the appellant on making enquiries learnt that a charge sheet under Rule 16 of the Central Civil Services

(Classification, Control and Appeal) Rules, 1965 was prepared against the appellant, though was not served on the appellant;

- (vi) That the appellant was also not promoted to the post of Sub-Divisional Engineer for the same reasons and was superseded;
- (vii) That the appellant, on 8th April, 1999, filed W.P.(C) No.3025/1999 before this Court and of which notice was issued;
- (viii) That the respondent MTNL admitted in the said writ petition that the charge sheet was in fact intended against some other officers and not against the appellant;
- (ix) Accordingly, the writ petition was disposed of on 27th February, 2002 imposing cost of Rs.7,500/- on the respondent and the appellant was promoted retrospectively with effect from the date of promotion of his immediate juniors;
- (x) That had the application of the petitioner for deputation with TCIL been forwarded, the appellant would have definitely been selected and would have gone for foreign assignment for a

period of three years and would have earned foreign allowance of US\$ 18 per day and would have earned equivalent of Rs.8,67,240/-;

Accordingly, the suit for recovery of the said amount towards damages was filed.

4. The respondent MTNL filed written statement contesting the suit. However, subsequently MTNL was proceeded against *ex parte* and *ex parte* evidence led by the appellant.

5. Learned Additional District Judge has dismissed the suit, reasoning that:

- (a) The claim was barred by time; the cause of action if any accrued to the appellant in 1997 and the suit was filed only in 2002 i.e. much after three years from 1997;
- (b) Even if the application of the appellant had been forwarded, the appellant merely had a chance to be selected by TCIL;
- (c) Even if the appellant had been selected, it was not necessary that he would have been posted on deputation to foreign

countries or would have earned the monies on the basis whereof compensation was claimed;

(d) The appellant had thus failed to prove any loss, for which damages could be awarded to him.

6. The counsel for the appellant has at the outset contended that the learned Additional District Judge erred in dismissing the suit as barred by time, though no issue to that effect had been framed.

7. However, attention of the counsel for the appellant is drawn to the fact that the respondent / defendant having been proceeded against *ex parte* and the appellant having led *ex parte* evidence, the stage for framing of the issues did not arise.

8. The counsel for the appellant next contended that the learned Additional District Judge ought not to have gone into the aspect of limitation when no such defence even was taken by the respondent defendant in the written statement filed, even though the respondent defendant was subsequently proceeded against *ex parte*.

9. I have perused the written statement in the trial Court record and do not find any defence of limitation having been taken therein. However, Section 3 of the Limitation Act, 1963 imposes an obligation on the Court to not allow claim unless the same is within time. Reference if any required in this regard, can be made to ***State of Orissa Vs. Mamata Mohanty*** (2011) 3 SCC 436. It is thus not as if the aspect of limitation is to be gone into only upon a defence to that effect being taken. If issues had been framed, the appellant could have definitely argued that without an issue being pressed, the appellant was not required to lead evidence on the aspect of limitation, if the same were to entail disputed questions of fact. However, in the present case, no issues were framed and it was for the plaintiff to, in his *ex parte* evidence, show that the suit claim was within time.

10. The counsel for the appellant then refers to Section 14 of the Limitation Act and contends that the period for which the appellant was pursuing the writ remedy should have been excluded.

11. However again, neither did the appellant plead any case under Section 14 of the Act nor lead any evidence thereon; so much so, that even the writ petition filed was not proved and all that was placed before the Trial Court

was the copy of the order in the writ petition. It is also not the case of the appellant that any such argument even was raised. The appellant, in the memorandum of this appeal also, has not taken any such ground. The argument of Section 14 of Limitation Act is being raised in a off-the-cuff fashion and which is not permissible. I have, in *State Farms Corporation of India Ltd. Vs. Dr. Mahendra Singh* 205 (2013) DLT 326 held that for Section 14 to apply, pleading and proof of good faith is essential and in the absence of any pleading, argument is without force. Reference in this regard may also be made to *Surinder Pal Vs. Surinder Pal* MANU/PH/1076/2015. Moreover, for Section 14 to be attracted, it is to be shown that the Court, before which earlier proceeding was being prosecuted, from defect of jurisdiction or other cause of like nature, was unable to entertain the same. The writ petition filed by the appellant, in fact, succeeded.

12. Rather, a perusal of the order in the writ petition does not show the appellant to have made any claim therein with respect to the application for being placed on deputation with TCIL or for damages for non-consideration thereof or any liberty having been granted to the petitioner for pursuing the said claim. For this reason also, it is not open to the appellant, at this stage,

to contend that the benefit of Section 14 of the Limitation Act ought to have been given to him.

13. Else, the counsel for the appellant has not disputed that the limitation applicable was of three years and the cause of action accrued in the year 1997. It is quite evident that the suit was instituted much after the said period of three years.

14. No ground for interference with the finding of dismissal of the suit as barred by time is made.

15. Considerable merit is also found in the reasoning given by the Trial Court for dismissal of the suit on merits also. All that was pleaded and deposed in *ex-parte* evidence was that if the appellant had been given a foreign post on deputation with TCIL, he would have earned allowances at the rate of US\$ 18 per day for three years for which the deputation would have lasted. Not only are there many ifs and buts in the aforesaid claim but also, ordinarily understood, an allowance is meant to recompense for the expenses incurred at the foreign locale and is not a saving, to be remitted back to India. The appellant is not found to have proved to the contrary.

16. Thus, there is no error in the reasons given by the Trial Court for dismissal of the suit on merits also.

17. The counsel for the appellant has lastly contended that it having been established in the writ petition that the appellant had been wronged, some nominal damages ought to have been awarded.

18. I am afraid, no finding to the said effect is found in the writ petition also. However, the petitioner having been compelled to file the writ petition, he was compensated with costs of Rs.7,500/-. The appellant having invoked the writ remedy for his grievance and having neither made a claim therein for compensation nor having obtained liberty of the writ Court to separately sue for compensation, cannot now be permitted to agitate the said aspect.

19. There is thus no merit in the appeal, which is dismissed.

No costs.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J

AUGUST 10, 2015

‘gsr’

(Corrected and released on 2nd September, 2015).