

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.212 OF 2014

Shri Nishikant Narayan Kale ...Appellant
vs.
Bajaj Tempo Limited (Now Foc Motors Limited) ...Respondent

....
Mr. Nishikant N. Kale, Appellant present in person.

Mr. Vishal Talsania, a/w. Mr. Netaji Gawde, i/b. Sanjay Udeshi & Co., for
the Respondent.

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CORAM : S.C. GUPTE, J.

DATED : 5 JUNE 2017

(JUDGEMENT) :

. This Second Appeal challenges the judgment and order passed by the District Court at Pune in Civil Appeal No.616 of 2012, which was directed against the judgment and decree passed in Special Civil Suit No.1296 of 1991 filed by the Appellant in the Court of Joint Civil Judge, Senior Division, Pune. Both courts below dismissed the Appellant's suit by concurrent findings.

2. The Appellant was appointed as a Planning Manager of the Respondent vide letter dated 18 May 1980. The appointment was on probation for a period of six months. Vide letter dated 28 November 1980, he was confirmed in the services of the Respondent. In August 1988, he was promoted as a Senior Manager with retrospective effect

from 1 August 1987. It is the case of the Appellant that whilst working diligently for the Respondent, on 24 April 1989, the Managing Director of the Respondent Company asked the Appellant to submit his resignation, failing which, the Managing Director threatened to terminate him from the services. The Appellant did not submit his resignation. By a letter of the same date, i.e. 24 April 1989, the Respondent Company terminated the Appellant's services. Being aggrieved, the Appellant approached the Civil Court by filing the present Civil Suit, inter alia, praying for a declaration that the termination of the services was illegal, null and void and praying for reinstatement with arrears of salary till the date of the suit and thereafter till such reinstatement. The Trial Court, by its judgment and decree dated 8 February 2005, held that the Appellant had failed to prove that the termination of service on 24 April 1989, was illegal, null and void and that he was not entitled to be reinstated in service of the Respondent Company. The Trial Court, however, was of the view that the Appellant was entitled to recover arrears of one month's basic salary and LTA difference for the years 1987 and 1988, and also difference in salary and allowances. The Trial Court, accordingly, partly decreed the suit with costs by ordering the Respondent to pay an amount of Rs.1490/- towards the difference in basic salary from 1-10-1987 to 24-04-1989 to the Respondent, Rs.1985/- towards the difference in one month's basic salary in lieu of notice, and Rs.2500/- towards difference of LTA for the years 1987 and 1988. The total decretal amount together with costs worked out to Rs.14,119/-. The Appellant carried the matter in a Civil Appeal before the District Court. The District Court, by its impugned judgment and order dated 9 October 2013, dismissed the appeal. The Appellant has come to this

Court by way of this Second Appeal, challenging the dismissal order of the District Court. The appeal was admitted on a question of law, namely:

“Whether the courts below were right in holding that it was a contract of 'Personal Service' which is not enforceable in law?”

3. It is submitted by the Appellant, who appears in person, at the hearing of the Second Appeal that the termination of his services was illegal, since the Respondent did not fulfill the condition precedent for such termination by paying the full one month's salary to the Appellant (leaving a short-fall of Rs.1985/-) and also by paying full arrears of salary at the date of termination of service. It is submitted that the termination was even otherwise wrongful. The Appellant submits that he is entitled to be reinstated in service with full arrears of salary upto the date of reinstatement. In addition to the claim of reinstatement, the Appellant prays for compensation under various heads. The heads of compensation are on the premise that the termination was illegal, as also on the premise that the Appellant was denied certain perquisites, which were part of this total pay-package, such as reinstatement of telephone bills, other perquisites like medical expenses, provident fund, gratuity and superannuation etc. as also a certain allowance payable under a scheme known as 'safari allowance scheme' and also certain allowance to be given to Senior Managers on promotion.

4. The Appellant's claim of wrongful termination is on the

footing that the termination was without mentioning any reason for such termination and without reference to any service rule or regulation. The Appellant has a grievance even about the service of the termination order. It is also submitted that the termination, being without fulfilling condition precedent such as payment of arrears as well as notice salary, is illegal, null and void and the Appellant ought to be reinstated in service with full back wages. It is pertinent to note that the Appellant was appointed by the Respondent in a managerial capacity. There are no service rules or regulations placed on record by either party governing the services for the post held by the Appellant, namely, that of Planning Manager and later as Senior Planning Manager. The Appellant is obviously not a workman within the meaning of Section 2(s) of the Industrial Disputes Act. His termination is not on account of any unauthorized absence or breach of service conditions or, in any way, punitive in nature or containing any career stigma. The termination is purely on the basis of a contractual right on the part of the Respondent company to terminate the services of the Appellant with one month's notice or salary in lieu thereof. The Respondent is not a statutory corporation or instrumentality of state. The Appellant is not, thus, governed by any special labour law or the constitutional provisions in the matter of service. In the absence of any statutory or constitutional law governing his services, the incidents of the Appellant's services, including the right of the employer to terminate such services, must go by the contractual provisions. It is an admitted position between the parties that the Appellant was appointed vide appointment letter dated 18 May 1980. There is a specific clause in this appointment letter to the following effect:-

“ After your services have been confirmed, your appointment may be terminated by giving one month's notice or a month's pay in lieu of the notice.”

The Respondent, in the premises, clearly had a right to terminate the Appellant's appointment by a one month notice or a month's pay in lieu of such notice. Such notice did not have to state any reasons. In fact, there need not be any reason at all for termination of services in the face of such a clause. A senior position, such as the one held by the Appellant in a corporate entity, is based on confidence enjoyed by the Appellant of the management of the company and the latter is perfectly within its rights to terminate the engagement, in case he does not enjoy such confidence and the latter does not propose to continue the engagement.

5. The fact that full notice pay or arrears of salary due as on the date of the termination were not paid or offered to be paid to the Appellant whilst terminating the services, does not undermine the validity of such termination. There is nothing in law to suggest that the payment of notice pay or arrears of salary is a condition precedent for termination of service. If the notice pay or arrears are not paid, such non-payment may at best give rise to a claim for recovery of payment. It cannot *per se* affect the validity of the termination.

6. In his written submissions, the Appellant makes a far-fetched claim that having been an allottee of 1000 equity shares towards the

employees share option, the Appellant is actually in a position of an owner of the company and is entitled to participate in the affairs of the company. The argument is merely required to be stated to be rejected. The capacity of the Appellant as a shareholder of the company is distinct and separate from his capacity as an employee of the company. As noticed above, his service conditions are governed by the terms and conditions of the employment contract. The validity of his termination can only be assessed with reference to such terms and conditions. It has nothing to do with his capacity as a shareholder of the company.

7. The Appellant has raised various other subsidiary points in his written submissions. One of the points concerns non-deposit by the Respondent of the decretal amount, including costs computed by the Trial Court. It is submitted that instead of the total decretal amount of Rs.14199/-, the Respondent has merely deposited Rs.5975/-. As a fall-out of this short payment, it is submitted by the Appellant that there being non-compliance of the decree of the Trial Court, as also an order passed by a learned Single Judge of this Court (Per K.J. Rohee, J.) in the First Appeal (the First Appeal being earlier on the file of this Court before transfer of jurisdiction), which directed the Respondent to deposit the entire decretal amount within four weeks, the Respondent has lost its right of defence. The Appellant has referred in this behalf to the provisions of Rule 11(2) of Order 39 of the Code of Civil Procedure (Bombay Amendment), introduced by the Maharashtra State Government by notification dated 5 September 1983. Rule 11 of Order 39 confers discretion upon the Court to dismiss a suit or proceeding or strike out a defence, if any default or contravention or breach is

committed, respectively, by the Plaintiff/Applicant or the Defendant/Opponent of an interim order. It also empowers the Court to restore such suit or proceeding or hear the party in defence if the party in default or in contravention makes amends for such default, contravention or breach to the satisfaction of the Court. This provision is introduced by the State legislature to ensure compliance of temporary injunction or any other interlocutory orders passed by the Court in the proceedings. In the event of a money decree, if the decree is not complied with, it is for the decree holder to have the decree executed against the judgment debtor by methods known to law. Non-compliance of a monetary decree cannot invite dismissal of an appeal from the decree under Rule 11 of Order 39 of the Code.

8. The Appellant also submits that the Respondent having failed to comply with an order to answer interrogatories, or for discovery or inspection of documents, its defence ought to have been struck out. This submission is on the footing that in the appointment/confirmation letter of the Appellant, there is a stipulation that his services will be governed by rules and regulations of the company and the standing orders applicable to him for the time being, or as may be framed from time to time. In answer to one of the questions forming part of the interrogatories served on the Respondent, namely, answer to question No.2, as to whether the Respondent has maintained service rules and regulations for workmen and staff employees, the Respondent stated in the negative, followed by a statement that model standing orders were applicable to workers and supervisory staff. It is submitted that even in response to a notice given to produce copies of rules and regulations of

the company applicable to the grade of Manager and Senior Manager for the period 1-10-1987 to 24-04-1989, the Respondent claimed that no such documents were in existence or in the custody of the Respondent. From this, it is sought to be inferred by the Appellant that the Respondent is hiding its service rules and regulations from the Court, and there is non-compliance with the order to answer interrogatories as well as for discovery and inspection of documents. It is submitted that under Order 11 Rule 21 of the Code, the Respondent's defence is liable to be struck out for such non-compliance. There is absolutely no substance in the submission. Nothing is brought on record to show that the Respondent infact has rules and regulations for the services of Managers and Senior Managers. As far as workers and staff employees are concerned, the Respondent has unequivocally stated its position that there are no such service rules but that the services of workers and supervisory staff are governed by model standing orders. These responses to the notice of discovery and interrogatories are legitimate and in order, and cannot be termed as wanting in compliance with any order to answer interrogatories or for discovery or inspection of documents.

9. In the facts of the case, there would really be no occasion to consider the nature of the contract of employment between the parties – whether the same is a contract of personal service and therefore, not capable of specific performance. Specific performance can be ordered only in a case, where there is a breach of contract on the part of the promisor and, as a result, the promisee sues the promisor for fulfillment of the promise. In the present case, as I have noted above, there is no

breach of contract committed by the Respondent in the matter of termination of the Appellant's services and there is no occasion to consider any relief, including any specific relief such as reinstatement of service, in the premises. Nevertheless, since this was one of the matters urged before, and decided by, the Courts below and pressed at the time of admission of the appeal, I have thought it fit to rule on this question which, in any event, can be treated as an alternative plea.

10. The contract between an employer and employee is a contract of personal service. By its very nature it cannot be enforced by or against the employer, as affirmed by the Supreme Court in **Nandganj Sihori Sugar Co. Ltd. vs. Badri Nath Dixit**¹. The remedy of the employee is to sue for damages if the contract is terminated in breach of its conditions. Under the law of contract and the civil law, an employee, whose services are terminated, cannot seek the relief of reinstatement or back-wages (see, the judgement of the Supreme Court in **Jitendra Nath Biswas vs. Empire of India & Ceylone Tea Co.**²). It is another matter, if his services are protected under an industrial law or other statute. Such protection is an exception to the ordinary rule that a contract of personal service or employment cannot be sought specific performance of, either by or against the employer. A public servant, for example, cannot be removed except in accordance with the provisions of Article 311 of the Constitution. A workman coming within the definition given in Section 2(s) of the Industrial Disputes Act has the protection against removal under the provisions of that Act. So also, if a statutory body acts in breach of mandatory provisions of the statute whilst terminating the

¹1991 AIR 1525

²1990 AIR 255

contract of its employer, an injunction or an order of specific performance may follow. These three are well-known exceptions to the ordinary rule contained in Section 14(1) (b) of the Contract Act, namely, that a contract, which is so dependent on volition of the parties, or otherwise by its nature is such, that the court cannot enforce specific performance of its material terms, shall not be so enforced. The Appellant's case does not come within any of these exceptions. The ordinary rule of Section 14(1)(b) must, therefore, apply and no specific performance of the contract can be sought.

11. Coming now to the monetary relief claimed by the Appellant, as held by the lower Appellate Court, there appears to be no error committed by the Trial Court in calculating the monetary relief. As noticed by the lower Appellate Court, after confirmation, the Appellant was entitled to draw basic salary, dearness allowance, house rent allowance etc., all of which were included in the monthly salary. After considering the salary and the difference in basic salary on the promotion to the post of Senior Manager, the difference of salary has been correctly worked out by the Trial Court. There is no question of granting any compensation towards any extra monetary benefits by way of reward for valuable suggestions made by the Appellant. As for the other heads such as car allowance, safari allowance, medical allowance, provident fund, etc., the Trial Court has considered the evidence before it and rightly declined to grant any monetary relief under either of these heads. The Appellant has not made out any case to show that computation or grant of monetary relief by the Trial Court, as upheld by the lower Court, is erroneous on any question of law.

12. As far as the decree of the Trial Court is concerned, the lower Appellate Court is, however, clearly in error in observing that the deposit of Rs.5975/- covers the entire decretal amount. The decretal amount computed by the Trial Court works out to Rs.14,199/-. The suit was partly decreed by the Trial Court with costs. The bill of costs given under the hand and seal of the Trial Court on the date of the order, namely, 8 February 2005, puts the Appellant's (Plaintiff's) cost at Rs.8227/-. The Respondent was bound to deposit this amount in addition to the salary and other dues decreed by the Trial Court in accordance with the order passed in the First Appeal. The Respondent, not having deposited this amount, will have to pay the same with interest to the Appellant. The Respondent is, in the premises, directed to pay the difference in the decretal amount calculated at Rs.8,227/- to the Appellant with interest at the rate of 9% per annum from 8 May 2006 till payment or realization.

13. The Second Appeal is disposed of accordingly.

(S.C. GUPTE, J.)