

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

+ C.R.P. No. 8/2017 and CM APPLN. No. 1602-1603/2017

Judgment reserved on : 18.07.2018

Date of decision : 05.09.2019

GEBR PFEIFFER (INDIA) PVT LTD. Petitioner
Through: Mr. Davesb Bhatia, Advocate

versus

PRADEEP SHARMA Respondent
Through: Mr. Sanjeev Kumar, Advocate

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

CM No. 1602/2017

CM No.1602/2017 an application filed on behalf of the petitioner seeking condonation of delay of 24 days in filing the petition.

In the interest of justice, the application is allowed and the delay of 24 days in filing the petition is condoned.

The application is disposed.

CRP 8/2017 and CM No. 1603/2017 (Stay)

1. The petitioner vide this petition under Section 115 read with Section 151 Code of Civil Procedure, 1908, as amended seeks the

setting aside of the order dated 7.9.2016 of the learned ACJ/CCJ/ARC(W), Tis Hazari Courts, Delhi in CS No. 8569/2016 vide which an application under Order 7 Rule 11 CPC filed by the petitioner herein as the defendant to the said suit seeking rejection of the plaint was declined with it having been observed to the effect:

“ I have considered the contentions of both sides. Admittedly, plaintiff joined the defendant company as Manager at Level 4 on 17.11.2000 vide letter of appointment dated 17.11.2000. Subsequently, he was terminated from service by the defendant, vide termination letter dated 02.09.2013. It is the case of the plaintiff that no notice of two months as required by the agreement/letter of appointment dated 17.11.2000 was ever served on him and that his service was not contractual but it was permanent. On the other hand, as per the defendant, the very fact that the plaintiff accepted the salary cheque in lieu of two months’ notice was sufficient to have terminated the service of the plaintiff. The present case appears to involve various mixed questions of law and fact, which can be determined only after the parties are allowed to lead their evidence. Prima facie cause of action in favour of the plaintiff appears to be made out from the plaint. The judgments relied on by the counsel for defendant do not help his case as they are based on a different factual matrix. Accordingly, I do not find any merit in the application of the defendant moved under Order 7 Rule 11 CPC. The same stands dismissed.”

2. The petitioner and the respondent to whom notice was issued vide order dated 16.1.2017 have both been heard qua the petition. Vide order dated 16.1.2017 itself it had been directed to the effect that during the pendency of the petition no order disposing of the suit could be passed which is under operation till date.

3. Submissions were made on behalf of either side.
4. A bare perusal of the copy of the plaint submitted before the learned Trial Court indicates that it was averred therein to the effect:

“ 2. That on 17.11.2000, the plaintiff was appointed as a Manager through a letter ref: PI/PERS/APT/04. In the said letter, the defendant also described the other benefits, facilities to the plaintiff.”

5. It was also submitted by the plaintiff i.e. the respondent herein that because of his good performance, dedicated efforts and extraordinary service and dynamic leadership, he was repeatedly promoted and was even *inter alia* awarded *ex gratia* wages by the defendant company i.e., the petitioner herein till 8.3.2013. The plaintiff therein further averred vide paragraphs 26,27,28,29, 30 and 31 to the effect:

“26. That as per the letter dated 02/09/2013, videi Ref. - No. PI/A&T/04/8332, the then President illegally, unilaterally and without assigning any plausible reason whatsoever, terminated the plaintiff from his service, which is absolutely illegal and against the rule of law.

It becomes necessary to mention here that the main intention of the defendant was/is to think about their own benefit and interest, which further establishes by the Clause no.4 of the Letter of Appointment given by the defendant, which states “ The COMPANY OR YOU, THE EMPLOYEE, MAY TERMINATE WITHOUT ASSIGNING ANY REASON THIS CONTRACT OF APPOINTMENT BY GIVING TWO MONTHS NOTICE IN WRITING. On the other hand, the clause no. 6 of the appointment of letter, it states “ YOU SHALL NOT ENGAGE IN ANY OTHER BUSINESS OR EMPLOYMENT DIRECTLY OR INDIRECTLY WITH ANOTHER COMPANY/ AGENCY/ ORGANIZATION DURING YOUR TENURE WITH THIS COMPANY AND THE CONTRACT OF APPOINTMENT IS MADE ON THE BASIS THAT YOU SHALL BE A WHOLE TIME EMPLOYEE OF THE COMPANY”. Thus, the defendant cannot act unilaterally and they have no right to overlook the

devoted service of the plaintiff, who did not even think about other job while working with the defendant.

The plaintiff has never ever imagined that he would have to face a date with such type of insult and malicious/unkind treatment given by the company/defendant to a founder employee/member and forth employee of the company, who had attached with the company since its commencement (i.e. 01.12.02), when there were hardly six persons/engineers and due to his illegal termination, his entire future prospect has been ruined.

27. That the plaintiff, who has been the founder employee and 4th appointee of the defendant since its commencement (01.12.2000 with a group of only 6 persons/engineers and' the company flourished their business only due to sincere, devoted and honest service of the plaintiff, which is further substantiated as aforesaid and during his entire period of service of more than 13 years, the plaintiff never gave, any kind of complaint to the defendant and thus, his termination

from, his service is absolutely illegal, which further clearly establishes, when the defendant company went on their high position, they kicked out the plaintiff from the company without considering the fact had the plaintiff not given his utmost, the defendant would not have gone its high status. The plaintiff has got overwhelming documents/letters issued by the defendant from time to time, which clearly establishes that the defendant was very much pleased from the service rendered by the plaintiff and those letters are adequate to favour the case of the plaintiff against the defendant. Had the plaintiff been negligent in his service under the defendant, then it is not understood as to why the defendant issued several appreciation and reward letters to the plaintiff and it is further not understood as to what circumstance was with the defendant so that they illegally terminated the unblemished service of the plaintiff. The defendant was required to consider those appreciation letters/reward letters before illegal termination of the plaintiff. Had those letters been taken into consideration by the defendant, then the defendant would definitely gone at other

conclusion, which would have further definitely suited the business prospect of the defendant.

28. That the plaintiff asked the defendant as to why he was illegally terminated his unblemished service but to tangible reason whatsoever was given by the defendant and as such, their illegal and nefarious act has brought serious mental pain to the plaintiff. The termination order dated 02.09.2013 is absolutely illegal as the defendant did not follow the due procedure before his termination from his service. Without prejudice to the right and contention of the plaintiff, the defendant was required to give show cause notice and/or to issue charge-sheet, if any, but the defendant did not adopt the legal way, which act of the defendant is highly objectionable and questionable and they have no right to terminate the service of anyone including the plaintiff in absence of any complaint, charge etc. and more so, when the plaintiff was never charge-sheeted due to his any wrongs, which could have given any reason to the defendant to take any suitable legal action against the plaintiff. Here, no such legal produce has been adopted by the defendant. When the defendant did not given any satisfactory reply to the plaintiff, he got served a legal notice dated 06/11/2013 thereby calling upon the defendant to recall the order of termination dated 02.09.2013 and to reinstate him in his old service but despite receipt of the said legal notice, the plaintiff neither gave any reply nor comply with the said notice. Since the date of illegal termination of the plaintiff, he did not apply anywhere for his job due to the clause mentioned in the appointment letter and as such, he has been constrained to remain jobless and he was constrained to encash the cheque of Rs.4,70,000/- and he has suffered huge damage at the hands of the defendant for which, the plaintiff reserves his right to initiate separate legal action against the defendant. The plaintiff, in order to avoid any litigation with the defendant, did not initiate any legal action against the defendant and finally got served a reminder dated 21.4.2014 but again the defendant did not respond at all. Instead of complying with the legal notice dated 06/11/2013 and 21/04/2014, the defendant sent a

false and frivolous reply dated 28.5.2014 to cause more and more harassment to the plaintiff.

29. That thus, the fact of the matter remains that the plaintiff has been illegally terminated from his service. It is not out of place to mention here that the termination order is not only perverse and arbitrary but the same is illegal and as such, the same is liable to be set aside and further considering the aforesaid genuine facts of the plaintiff and further since the defendant has illegally and unilaterally terminated the plaintiff from his devoted service and since despite receipt of the legal notice dated 06/11/2013, the defendant has failed to do the needful, therefore, the plaintiff has got no other efficacious remedy available to him except to approach before this Hon'ble court thereby declarating termination order dated 02/09/2013 is absolutely illegal, hence this suit for declaration.

30. That plaintiff also requested the officials of the defendant to take back him in his old service and since the defendant has refused to take the service of the plaintiff, therefore, it is highly necessary to direct the defendant to take the plaintiff in his service, hence this is a suit for mandatory injunction.

31. That the cause of action arose in favour of the plaintiff and against the defendant, when the defendant illegally and without assigning any plausible reason whatsoever terminated the plaintiff from his service on 02/09/2013 and further when despite repeated requests of the plaintiff, the defendant failed to do the needful and further when the plaintiff was constrained to serve a legal notice upon the defendant and further when despite receipt of the legal notice of the plaintiff, the defendant again failed to do the needful and further when the plaintiff was constrained to serve a reminder dated 21/04/2014 upon the defendant but the defendant again did not pay any heed and sent a false and frivolous reply dated 28/05/2014. The cause of action is still recurring one."

6. The letter of appointment dated 17.11.2000 issued by the defendant of the suit i.e., the petitioner herein to the plaintiff/respondent vide clause 4 thereof states to the effect:

“ Termination of Appointment

The Company or you, the Employees may terminate without assigning any reason this contract of appointment by giving two months notice in writing.”

7. A bare perusal of the said letter of appointment indicates that on the respondent i.e., the plaintiff having accepted the said offer of appointment, the same culminated into a contract with the petitioner with the terms and conditions detailed in the said letter of appointment. The said appointment of the plaintiff i.e., the respondent herein with the petitioner company was apparently a contractual assignment *inter se* between the parties i.e., the plaintiff and the defendant i.e., the petitioner company. The petitioner company in no manner falls within the domain of the State in terms of the Article 12 of the Constitution of India.

8. Clause 4 of the letter of appointment issued to the respondent herein i.e., the plaintiff made it clear that the company or the plaintiff could terminate without any reason the contract of appointment by giving two months' notice in writing.

9. Vide letter dated 2.9.2013, the petitioner company i.e., the defendant in terms of clause 4 i.e. **‘Termination of Appointment’** in terms of letter dated 17.11.2000 terminated the employment of the plaintiff i.e., the respondent herein stating to the effect:

“Clause No.4 Termination of Appointment

The Company or you, the Employee, may terminate without assigning any reason this contract of appointment by giving two months notice in writing.

The. management has decided to terminate your employment with the company w.e.f. 2nd September, 2013. In lieu of the

notice period of two months and full & final settlement please find attached, a Cheque No, 008847 Amount-354097/- dated 02.09.2013 Drawn on Deutsche Bank equivalent to two months' salary and full & final Settlement.

You are also directed to contact the, HR and Admin with a prior appointment to settle for gratuity on or before 30 days."

10. In terms of the letter dated 2.9.2013, the petitioner company also sent the gratuity settlement received from the LIC vide a cheque of Rs.4,70,000/- bearing No. 861906 dated 4.10.2013 towards the gratuity settlement account.

11. The averments made in the plaint vide paragraph 28 of the plaint referred to herein above bring forth clearly that the said cheque of Rs.4,70,000/- was encashed by the plaintiff i.e., the respondent herein though undoubtedly the respondent has sought to contend through the plaint that he got the same encashed because of his having remained jobless, the same does not detract from the contents of the terms of the letter of appointment, clause 4 thereof, which permitted the parties to the contract to terminate the contract without any reason by giving two months notice in writing and in the instant case in as much as the notice in writing of two months had not been granted to the respondent by the petitioner herein, the petitioner company had made the payment of the two months' salary to the tune of Rs.354097/- vide a cheque bearing No. 008847 dated 2.9.2013 equivalent to the two months' salary as full and final settlement.

12. It is apparent that in the facts and circumstances in the instant case that in terms of the contract between the petitioner/defendant and the respondent/plaintiff the contract entered into was a contract of

personal service to which the principles of Section 41 (e) of the Specific Relief Act, 1963 wholly apply. Section 41(e) of the Specific Relief Act, 1963 provides to the effect:

“ 41. Injunction when refused.— An injunction cannot be granted—

(a)

(b)

(c)

(d)

(e) To prevent the breach of a contract the performance of which would not be specifically enforced;

.....”

13. On behalf of the petitioner reliance was placed on the verdict of the Hon’ble Supreme Court in *Pearlite Liners (P) Ltd. v. Manorama Sirsi*; (2004) 3 SCC 172, to submit that where the contract falls within the domain of a contract for personal services, the prayers of the kind as made through the plaint filed by the respondent herein i.e.. the plaintiff of the suit seeking a declaration that the termination order dated 2.9.2013 was illegal and invalid and was not binding upon him and the grant of further injunction against the employer company directing him to reinstate the plaintiff back in his later service with all consequential relief was specifically barred in terms of the provisions of the Specific Relief Act, 1963. The observations in paragraph 5 to 10 of the Hon’ble Supreme Court in the said verdict read to the effect:

“5. Therefore the legal question for consideration which arises is :

"Can a contract of service be specifically enforced?"

6. The relationship between the parties is based on a contract between two private parties. Admittedly, there is no written

contract. If there had been a written contract, it would have contained terms and conditions governing the relationship between the parties. In spite of absence of a written contract governing the relationship between the parties, respondent-plaintiff challenged the transfer order by filing the present suit. She raised several grounds in this behalf including that the transfer was illegal as it was to a different Company. The transfer was to a lower post which means it is by way of punishment. Further according to the plaintiff the place to which she had been transferred was not suitable to work at. The defendant denied all these allegations in the written statement. Apart from challenge to the transfer order, the plaintiff sought a declaration that she continued to be in service of the defendant and was entitled to all emoluments including salary. Further an injunction was prayed to restrain the defendant from holding inquiry against the plaintiff. Significantly, no prayer for damages for breach of contract was made in the suit.

7. Learned counsel for the appellant argued that the prayers in the suit seek reinstatement of the plaintiff as an employee of the defendant Company which really amounts to specific performance of a contract of personal service which is specifically barred under the provisions of the [Specific Relief Act](#). It is a well settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well recognised exceptions (i) where a public servant is sought to be removed from service in contravention of the provisions of [Article 311](#) of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute. [Per Executive Committee of Vaish Degree College, Shamli and ors. Vs. Lakshmi Narain and Ors. { (1976) 2 SCC 58 }].

8. The present case does not fall in any of the three exceptions. It is neither a case of public employment so as to attract [Article 311](#) of the Constitution of India nor the case is

under the Industrial Disputes Act. The defendant is not a statutory body. There is no statute governing her service conditions. The present is a case of private employment which normally would be governed by the terms of the contract between the parties. Since there is no written contract between the parties, the dispute cannot be resolved with reference to any terms and conditions governing the relationship between the parties. The plaintiff has neither pleaded nor there has been any effort on her part to show that the impugned transfer order was in violation of any term of her employment. In the absence of a term prohibiting transfer of the employee, prima facie the transfer order cannot be called in question. The plaintiff has not complied with the transfer order as she never reported for work at the place where she was transferred. As a matter of fact, she also stopped attending the office from where she was transferred. Non-compliance of the transfer order by the plaintiff amounts to refusal to obey the orders passed by superiors for which the employer can reasonably be expected to take appropriate action against the concerned employee. Even though it is a case of private employment, the management proposed to hold an enquiry against the delinquent officer, that is, the plaintiff. In case of such insubordination, termination of service would be a possibility. Such a decision purely rests within the discretion of the management. An injunction against a transfer order or against holding a departmental enquiry in the facts of the present case would clearly amount to imposing an employee on an employer, or to enforcement of a contract of personal service, which is not permissible under the law. An employer cannot be forced to take an employee with whom relations have reached a point of complete loss of faith between the two.

9. Let us now examine the prayers in the suit in the light of averments contained in the plaint. It is stated in Para 6 of the plaint that the Secretary of the Company warned her about her timings and issued a memo about her attendance. He demanded her resignation on 15th December, 1983. She did not resign as per the request. It is further stated in Para 7 that "she was discriminated against in the matter of providing incentives in

May, 1985.. She gave a representation to the Directors establishment to consider this aspect of the matter. Secretary in his reply dated 23rd May, 1985 abused her that she was not working properly." In Para 8, it is stated that the Secretary further issued her a notice stating that she had not worked for two years. Then follows the impugned transfer order dated 11th January, 1986. The plaintiff has further alleged that her representation against the said transfer order was not considered. This was followed by a notice to conduct an enquiry against the plaintiff. In the background of such facts, the plaintiff has in the suit made the following prayers :

" (a) Declaring that the impugned transfer order is illegal, void and inoperative.

(b) The plaintiff continues to be in service of the defendant Company and is entitled all emoluments including salary; and (c) Permanent injunction restraining the defendant from holding an enquiry against the plaintiff. "

10. The question arises as to whether in the background of facts already stated can such reliefs be granted to the plaintiff. Unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. Further it is to be considered that if the plaintiff does not comply with the transfer order it may ultimately lead to termination of service. Therefore, a declaration that the transfer order is illegal and void in fact amounts to imposing the plaintiff on the defendant inspite of the fact that the plaintiff allegedly does not obey order of her superiors in the Management of the defendant Company. Such a relief cannot be granted. Next relief sought in the plaint is for a declaration that she continues to be in service of the defendant Company. Such a declaration again amounts to enforcing a contract of personal service which is barred under the law. The third relief sought by the plaintiff is a permanent injunction to restrain the defendant from holding an enquiry against her. If the management feels that the plaintiff is not complying with its directions it has a right to decide to hold an enquiry against her. The management cannot be restrained from exercising its discretion in this behalf. Ultimately, this relief if granted would indirectly mean that the court is assisting the plaintiff in

continuing with her employment with the defendant Company, which is nothing but enforcing a contract of personal service. Thus, none of the reliefs sought in the plaint can be granted to the plaintiff under the law. The question then arises as to whether such a suit should be allowed to continue and go for trial. The answer in our view is clear, that is, such a suit should be thrown at the threshold. Why should a suit which is bound to be dismissed for want of jurisdiction of a court to grant the reliefs prayed for, to be tried at all? Accordingly, we hold that the trial court was absolutely right in rejecting the plaint and the lower appellate court rightly affirmed the decision of the trial court in this behalf. The High Court was clearly in error in passing the impugned judgment whereby the suit was restored and remanded to the trial court for being decided on merits. The judgment of the High Court is hereby set aside and the judgments of the courts below, that is, the trial court and the lower appellate court are restored. The plaint in the suit stands rejected.”

14. On behalf of the respondent reliance was placed on the verdict of the Hon'ble High Court of Madras in the case of ***V.Sadasivan and Others v. Binny Ltd. (represented by its Chairman and Managing Director) Madras & Anr.***; 1998 LLR 228 to contend to the effect that in as much as the services of the plaintiff i.e., the respondent had not been terminated on account of any charges of misconduct or as a sequel to any finding recorded against him in any properly constituted or conducted inquiry, the termination of his services was not proper and the workman in that case was directed to be reinstated with it having been observed that the employees were at liberty to seek their consequential reliefs and remedies as available in law in relation to the grant of backwages or damages.

15. Reference was made in this verdict of the Hon'ble High Court of Madras in *V.Sadasivan and Others v. Binny Ltd. (represented by its Chairman and Managing Director) Madras & Anr* (supra) in 1986-II LLN 1051 titled *O.P.Bhandari v. Indian Tourism Development Corpn. Ltd. and Others*; (1991 Supp (1) SCC 600) and 1991-I LLN 613 titled *Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress*; (1986) 4 SCC 337.

16. It is essential to observe that the employers in the said cases i.e., the Indian Tourism Development Corporation Ltd. and the Delhi Transport Corporation are public sector undertakings covered under Article 12 of the Constitution of India in relation to which it is laid down that by merely giving a notice or pay in lieu of notice cannot co-exist with Articles 14 and 16(1) of the Constitution of India in as much as such a rule has the effect of setting at naught the guarantee enshrined in Articles 14 and 16 thereof and it is essential to observe that the verdict of the Hon'ble Supreme Court in *Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress* (supra) takes into account that the DTC is a public sector undertaking.

17. Likewise, the verdict in *V.Sadasivan and Others* (supra) as observed by the Hon'ble High Court of Madras itself indicates that it relates to contentions wherein the petitioners in that case had sought to contend that they were workmen falling within the ambit of the Industrial Disputes Act, 1947. In the facts and circumstances of the instant case, the respondent plaintiff was clearly employed in terms of the letter of appointment dated 17.11.2000 to the post of a Manager

and thus does not fall within the ambit of definition of a workman in terms of Section 2(s) of the Industrial Disputes Act, 1947.

18. In the circumstances, the reliance that has been placed on behalf of the respondent on the verdict of the Hon'ble High Court of Madras is wholly misplaced and further more, it is essential to observe as has already been observed elsewhere herein above that the verdicts of the Supreme Court in ***O.P.Bhandari v. Indian Tourism Development Corpn. Ltd. and Others***; (1991 Supp (1) SCC 600) and 1991-I LLN 613 titled ***Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress***; (1986) 4 SCC 337 relate specifically to the public sector undertakings which clearly fall within the ambit of the State in terms of Article 12 of the Constitution of India.

19. The verdict of the Hon'ble Supreme Court in ***Pearlite Liners (P) Ltd. v. Manorama Sirsi***, (supra) in the instant case relied upon on behalf of the petitioner herein makes it apparent that the reliefs sought by the plaintiff as under:

“ i. *Pass a decree of declaration in favour of the plaintiff and against the defendant thereby declaring the termination order dated 02/09/2013 as illegal and invalid as well as is not binding upon the plaintiff.*

ii. *Pass decree of mandatory injunction in favour of the plaintiff and against the defendant thereby directing the defendant to take back/reinstate the plaintiff in his old service with all consequential relief.*

iii. *Award cost of the suit in favour of the plaintiff,*

apparently cannot be granted in view of the Clause 4 of the contract entered into between the petitioner and the respondent. Significantly,

as in *Pearlite Liners (P) Ltd. v. Manorama Sirsi*, (supra) in the present case also there has been no prayer made by the Plaintiff / Respondent herein in the suit for damages for breach of contract.

20. In the circumstances it is apparent that in as much as the contract of personal service that had been entered into between the respondent/plaintiff and the petitioner/defendant in the instant case could not have been specifically enforced in terms of Section 41 (e) of the Specific Relief Act, 1963, the relief that had been sought by the respondent plaintiff in suit CS No.8569/2016 cannot be granted in as much as none of the exceptions to the non-enforcement of a contract of personal service exists in the instant case in as much as the respondent herein is not a public servant sought to be removed from service in contravention of Article 311 of the Constitution of India in as much as the respondent herein is not a workman i.e., a workman in terms of Section 2(s) of the Industrial Disputes Act, 1947 who could seek to be reinstated on being dismissed under the industrial law in as much as the petitioner herein is not a statutory body which falls within the ambit of Article 12 as an instrumentality of the State which has committed any act in breach of violation of the mandatory provisions of the Statute.

21. In view thereof, it is apparent that the learned Trial Court has failed to exercise the jurisdiction vested in it and has acted in the exercise of its jurisdiction with material irregularity in having observed that the case appears to involve various mixed questions of law and facts which could only be determined after the parties were allowed to lead their evidence.

22. In view thereof, the impugned order dated 7.9.2016 of the learned Trial Court is set aside and consequentially the plaint in the suit CS No. 8569/2016 is rejected.

23. The petition and the accompanying application CM No. 1603/2017 are disposed of accordingly.

24. A copy of this order be sent to the learned Trial Court.

ANU MALHOTRA, J.

SEPTEMBER 5th, 2019/SV

