

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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FIRST APPEAL NO.1539 OF 2012

WITH

INTERIM APPLICATION NO.1161 OF 2020

IN

FIRST APPEAL NO.1539 OF 2012

Reliance Communication Limited)
A Company incorporated under the provisions)
of Companies Act, 1956 and having their)
Registered Office at “H” Block, 1st Floor, DAKC,)
Koparkhairane, Navi Mumbai – 400 710)Appellant

V/s.

Rajendra P. Bansal)
Aged 65.5 years, Occupation : Nil)
Indian Inhabitant residing at Tower B5 – Flat)
801, Sea Breeze Towers, Sector 16, Nerul (W),)
Navi Mumbai – 400 706)Respondent

Mr. Cyrus Bharucha a/w. Mr. Tushad Kakalia, Mr. D.J. Kakalia and Mr. Paresh Patkar i/b. Mulla and Mulla and CBC for Appellant.
Mr. Rajendra P. Bansal, Respondent present in person.

**CORAM : K. R. SHRIRAM & RAJESH S PATIL, JJ.
RESERVED ON : 19th JANUARY 2023.
PRONOUNCED ON : 20th JANUARY 2023**

JUDGMENT (PER K.R. SHRIRAM, J.) :

1 Appeal impugns an order and judgment dated 3rd June 2012 passed by the court of Civil Judge Senior Division, Thane in Special Civil Suit No.127 of 2010 (the said judgment).

2 Appellant is a company incorporated under the provisions of the Companies Act, 1956 and, *inter alia*, engaged in the business of telecommunication services. Appellant is undergoing Corporate Insolvency Resolution Process (“CIRP”) under the Insolvency and Bankruptcy Code,

2016 (“IBC”) pursuant to the order dated 15th May 2018 passed by the National Company Law Tribunal, Mumbai (“NCLT”) in C.P No.(I.B.) 1387 (MB) of 2017. Appellant is being represented in the present proceedings through its Resolution Professional.

3 Respondent is a former employee of appellant.

4 Respondent was appointed as an employee pursuant to an appointment letter dated 29th November 2001 that was issued by appellant (Exhibit 49). In the appointment letter clauses 2 and 8 (d) read as under:

“(2) SALARY & ALLOWANCES:

(1) Basic Salary : Rs.40,000/- (Rupees Forty Thousand Only) per month

(2) Cost of Living Allowance (COLA): Rs.3835/- (Rupees Three Thousand Eight Hundred and Thirty Five Only) per month.

You will also be entitled to Leave Travel Allowance and Medical Reimbursement. Besides the above, you will also be entitled to Bonus/ Ex-Gratia, Gratuity, Superannuation (if applicable), Medical & Personal Accident Insurance etc. in accordance with the Law/Company Policy from time to time. Your compensation details are indicated in the Annexure.

(8) TERMINATION OF PERMANENT SERVICE:

(a).....

(b).....

(c).....

(d) On satisfactory completion of the probation period and after your confirmation in writing except for the reasons mentioned in this appointment letter, your services can be terminated by giving notice of three (3) months of payment of salary (Basic + COLA) in lieu thereof on either side.”

5 On or about 31st October 2006 by Exhibit 53, appellant terminated the services of respondent. It appears from the letter that appellant was unhappy with the performance of respondent. In the termination letter, appellant has stated as under:

“As per your appointment letter dated November 29, 2001, your services are liable to be terminated without any notice or salary in lieu thereof for any act of inefficiency.

Hence it has been decided to terminate your services with immediate effect, i.e., close of office hours today Tuesday 31st October 2006.

As a goodwill gesture, the company shall pay you an amount equivalent to three months’ salary along with your Full and Final Settlement.”

6 Respondent filed Civil Suit challenging the termination of his employment. Respondent claimed that: a) the termination of services letter dated 31st October 2006 be declared as null and void, b) appellant to pay respondent a sum of Rs.5,49,35,488/- towards arrears of services contract compensations, encashment of combined balance earned leave, cost of living allowance (COLA) DA etc., c) sum of Rs.4,44,017- towards less accumulated provident fund balance and d) sum of Rs.3,50,000/- towards court fees plus legal expenses.

7 Appellant filed written statement and contested the suit.

8 Issues were settled by the Trial Court per Exhibit-29 and the following issues were framed:

	ISSUES	FINDINGS
1	Does plaintiff prove the defendant has committed a breach of service contract by terminating his services ?	In the affirmative.
2	Does he further prove declaring him as inefficient by the defendant is unjustifiable and illegal act ?	In the negative.
3	Does he further prove he is entitled to recover an amount of Rs.5,49,45,488/- from the defendants	In the negative.

	towards arrears of service contract, compensation, encashment of leave amount, gratuity COLA/DA, damages with interest	
4	Does he further prove an amount of Rs.4,44,017/- is due against defendant towards accumulated PF with interest @12% p.a. from 01/05/2007 till realization of entire amount?	In the negative.
5	Does he entitled for the reliefs as prayed for ?	As per final order.
6	What order ?	As per final order.

9 Appellant led evidence of one witness to defend the claim and respondent stepped into the witness box to justify his claim in the suit. Both cross examined each other. No other witness was examined for either side. After hearing the parties extensively, the Trial Court has given a reasoned judgment, which is impugned in this appeal. By the said judgment, the Trial Court rejected respondent's claim of Rs.5,49,45,488/- towards arrears of service contract, compensation etc. and the claim for Rs.4,44,017/- towards accumulated provident fund. Trial Court also rejected respondent's claim that he was wrongfully terminated and observed that appellant was entitled to terminate respondent's services without even having to ascribe any reason for termination in view of clause 8(d) of the appointment letter. Trial Court, however, granted a decree in favour of respondent (a) in the sum of Rs.4,82,112/- towards 3 month salary along with interest @ 18% p.a. from the date of termination, i.e., 1st November 2006 till realization of entire amount; (b) a sum of Rs.9,24,006/- towards leave encashment along with

interest at 18% from the date of termination, i.e., 1st November 2006 till realization of entire amount; (c) Rs.2,50,000/- towards damages to be paid by appellant to respondent within 3 months from the date of order; and (d) costs.

10 This appeal was admitted on 18th February 2013. Pending admission, appellant also deposited entire decretal amount, (except cost part), part of which respondent has withdrawn pursuant to an order dated 18th February 2013. Respondent was allowed to withdraw Rs.5,00,000/- without furnishing any security and further allowed to withdraw Rs.10,00,000/- on furnishing security to the satisfaction of the executing court and the executing court has been directed to deposit the balance amount in a fixed deposit scheme of any Nationalised Bank with renewal clause.

11 On or about 13th January 2020 respondent took out an interim application No.1161 of 2020 which is still pending for releasing balance amount of Rs.17,16,909/- that continued to be deposited in the Trial Court. When the interim application came up for hearing, appellant had raised an objection that this court will not have jurisdiction to entertain and dispose the interim application and the amount deposited by appellant in the Trial Court pursuant to order dated 10th December 2012 will be affected by the moratorium granted under section 14 of the IBC, since appellant was undergoing CIRP under IBC. Pursuant to an order 15th May 2018, passed by NCLT an interim resolution professional came to be appointed, who is prosecuting this appeal. This court, by a judgment dated 4th January 2023

disposed the objection of appellant by holding that this court will have jurisdiction to entertain and dispose the interim application because this appeal will not be affected by the moratorium granted under section 14 of IBC. Pursuant thereto, this appeal is taken up for final hearing. The said interim application no.1161 of 2020 is also being disposed by this order and judgment.

12 The points of challenge raised by Mr. Bharucha for appellant are that: a) the basic salary that the court has considered while granting 3 months compensation was erroneous; b) sum of Rs.3,20,807/- has been paid twice towards leave encashment; and (c) amount of Rs.2,50,000/- awarded as damages has been arrived at without any basis. Of course in the end Mr. Bharucha at the stage of rejoinder also submitted that the interest of 18% p.a. awarded by the Trial Court was excessive.

BASIC SALARY

13 Mr. Bharucha submitted :-

(a) Clause 8(d) of the appointment letter dated 29th November 2001 (Exhibit 49) which is quoted above, provides that respondent's services could be terminated by giving notice of 3 months or payment of salary in lieu thereof, and salary has been defined in clause 8(d) just to mean "Basic + COLA;

(b) In March 2002, the company decided to restructure the compensation being given to all employees and the compensation for every employee was worked out on cost to company basis. It was effective from 1st April 2002

and respondent herein also accepted the restructured compensation package;

(c) The two elements basic and COLA were combined with other benefits to arrive at only basic pay. The three months compensation that respondent would have been entitled to, therefore, is only basic pay which is shown in the revised compensation structure because the revised basic pay also has absorbed the COLA component;

(d) The Trial Court has erroneously calculated the basic salary by dividing the gross amount of cost to company of Rs.29,32,715/- which was the last drawn package, divided it by 12 and multiplied by 3 ($29,32,715 \times 12/3$) to arrive at the figure of Rs.7,33,179/- compensation in lieu of notice, payable to respondent. Trial Court has given credit for a sum of Rs.2,51,067/- which was paid in February 2007 after the termination and that is how arrived at the decretal figure of Rs. 4,82,112/-;

(e) The Trial Court has not analysed the submissions made by appellant and has not concluded as to why the cost to company was taken into account and not the basic salary, as submitted by appellant.

LEAVE ENCASHMENT

14 Mr. Bharucha submitted:

(a) that full and final settlement statement annexed to Exhibit-55 provides for leave encashment of Rs.3,20,807/- and the leave available was only 115 and erroneously a figure of Rs.9,24,006/- is shown for encashment of 115 days. By paying Rs.4,72,840/- vide letter dated 12th February 2007 (Exhibit

55), appellant has already paid to respondent an amount of Rs.3,20,807/- towards leave encashment. Mr. Bharucha submitted that even assuming for the sake of argument that Rs.9,24,006/- was the amount payable towards the leave encashment, the Trial Court erred in not giving credit to the amount of Rs.3,20,807/- which has been already paid and to that extent the amount of Rs.3,20,807/- has to be reduced.

15 On this, though, Mr. Bansal had a lot to say but in fairness he states that amount of Rs.3,20,807/- can be reduced.

DAMAGES OF RS.2,50,000/-

16 Mr. Bharucha submitted:

(a) The Trial Court has decided this issue without any explanation. Even for a moment, appellant accepts that they had committed a breach, why an amount of Rs.2,50,000/- should be paid as damages;

(b) Even assuming that appellant had delayed the payment of compensation vide Exhibit 55 and that assuming would have caused some hardship to respondent:

i) there is no evidence of how much hardship was caused, has come on record;

and ii) Trial Court has already awarded 18% interest for three months salary which was to be paid.

17 Mr. Bansal appearing in person submitted as under:-

BASIC SALARY - 3 MONTHS COMPENSATION

(a) The Trial Court has correctly taken cost to company figure of

Rs.29,32,715/- to arrive at monthly salary in lieu of notice payable;

(b) It was also understood by appellant that salary should not be as defined in the employment contract Exhibit 49 but it should be worked on the basis of cost to company. Our attention was invited to the payslip for the month of February 2006 (part of Exhibit 65), which provides for paid leave encashment of Rs.3,34,003.65 for 41 days. Therefore, it would be Rs.8146.43 per day, which for a month should be about Rs. 2,47,787.26. Our attention was invited to the income tax projection for year 2004-2005 (part of Exhibit 51), in which the company has informed Mr. Bansal that income chargeable to tax under the head salaries will be Rs.23,35,739/- and that itself, during that period comes to about Rs.2 lakhs and odd;

(c) Therefore, that there is no error committed by the Trial Court and amount as declared should be paid.

DAMAGES

18 Mr. Bansal submitted that he had suffered hardship and anybody can imagine what an employee, who has been unceremoniously terminated from employment would go through and there is nothing on record to indicate why appellant did not pay the termination package promptly. Mr. Bansal, therefore, states that Trial Court correctly inferred that he was entitled to damages, though he would have expected a higher amount, he has accepted the amount of Rs.2,50,000/- awarded and hence, has not impugned the Trial Court's order and judgment or any part thereof.

OUR FINDINGS

SALARY IN LIEU OF NOTICE

19 We do not agree with the submissions of Mr. Bharucha because in our view, the definition ‘salary’ was modified during the time when respondent was in appellant’s employment. Clause 8(d) of Exhibit 49 defines what is salary in case respondent’s services are terminated without notice. But that underwent a change when in March 2002 the salary and allowances payable to him was restructured. There was no COLA. Moreover, there is no evidence to indicate that basic pay mentioned in the revised compensation following the restructuring included COLA. That one has to only surmise. There is no cross examination of respondent also on this aspect.

20 Per contra in the cross examination of respondent, suggestions were put to respondent that his paid leave was calculated on the basis of basic salary. Cross examination proceeds as under:

“I have claimed 122 days for my leave encashment. In these 122 days neither casual nor sick leaves are included. I have not availed any P. L. during my service with the defendant. I have encashed P. L. for 41 days during my service. It is not true to say that I am entitled to 115 days PL. It is not true to say that my P. L. are calculated on the basis of my basic salary. Encashment of P. L. is as per company rules. I am bound by company rules. It is not true to say that as per company’s policy I am entitled to only basic salary for the purpose of encashment of accumulated P. L. I have received the amount of Rs.3,20,087/- towards P. L. encashment. I have not considered the amount of Rs.3,20,087/- in the amount of Rs.9,24,006/- as claimed by me towards encashment of C. E. L. I don’t know whether there is typographical error in mentioning the amount of Rs.9,24,006/- towards balance for my encashment.”

(emphasis supplied)

Therefore, it was appellant’s case that PL was calculated on the basis of basic salary. Let us see what was basic salary.

The pay slip for month of February 2006 (part of Exhibit 65)) refers to paid leave encashment. It is stated to be Rs.3,34,003.65 for 41 days. This would work out to Rs.8146.43 per day, approximately Rs.2,48,000/- per month. It was appellant's case that paid leave was to be calculated on the basis of basic salary as suggested in the cross examination. The basic salary, therefore, can never be Rs.83,688.98 as suggested by Mr. Bharucha. Moreover, the termination letter at Exhibit 53 provides that appellant was entitled to terminate the services of respondent without any notice in lieu of 3 months salary. Appellant cannot fall back on the definition of salary as mentioned in the appointment letter (Exhibit 49) when the salary and allowances has been restructured from 1st April 2002 and there is no mention of COLA in the revised compensation package. We have to also note that in the income tax projection for the year 2004-2005, which is forming part of Exhibit 51, the income chargeable to tax under the head of salaries was Rs.23,35,739/- and the earnings per annum of respondent is shown to be 23,38,112/- and the earnings included basic salary, house rent allowance, children education allowance, uniform allowance, leave encashment, special allowance, food coupons. Infact, these heads other than basic salary, should, in our view, also come under the definition of COLA.

21 In the circumstances, in our view, the Trial Court has not erred in applying the annual cost to company while determining the compensation in lieu of notice. We should also note that if appellant had given 3 months' notice for termination, appellant would have certainly paid respondent the

entire compensation as payable under the cost to company formula.

DAMAGES

22 When one reads the entire impugned judgment, what has weighed in the mind of the court is that appellant did not even make an attempt to explain why, when they have terminated respondent's service from 1st November 2006, the compensation was paid only on 12th February 2007. The court felt that the person, whose employment has been summarily terminated, would naturally suffer mental trauma. So also his family, and suddenly they would have no income also to survive. It is for that reason the appointment letter itself provided for 3 months' notice or salary in lieu of 3 months notice. Appellant was duty bound to hand over the severance pay along with the letter of termination and not waited for two and half months to make that payment. Therefore, Trial Court was justified in granting the amount of Rs.2,50,000/- as damages. Perhaps, this would work as deterrent to all corporate employers that they cannot target a helpless employee by using its own muscle and money power. Therefore we do not wish to interfere.

23 On Mr. Bharucha's submissions that the interest awarded at 18% per annum was excessive, in our view, the court had the discretion to award interest and it has awarded the interest. In *DDA Vs. Joginder S. Monga & Ors*¹ the Apex Court held grant of interest pendente lite and or future is a discretionary remedy and the rate of interest to be fixed having regard to

1. (2004) 2 SC 297.

the principle of restitution. We do not find that to be excessive in the facts and circumstances of the case. Hence, no interference is called for. Moreover, we find it is not even a ground raised in the appeal.

24 Therefore, appeal is partly allowed. A sum of Rs.3,20,807/- together with proportionate interest be reduced from the decretal amount deposited in the Trial Court. That would leave us to decide what to do with this amount of Rs.3,20,807/- plus accumulated interest thereon.

25 At the end of the hearing, Mr. Bansal submitted a copy of the decree, to which the bill of cost is attached. The Trial Court has allowed a sum of Rs.3,43,970/- be paid as costs to respondent. The suit was partly decreed with costs. Therefore, this amount of costs of Rs.3,43,970/- had to be paid to respondent and it has not been paid or deposited by appellant. Hence, we direct that the amount of Rs.3,20,807/- together with accumulated interest be paid over to respondent to cover the bill of cost plus interest thereon.

26 In view of the disposal of the appeal, interim application does not survive and accordingly along with the Appeal stand disposed. Trial Court to act on an authenticated copy of this judgment and not insist on certified copy though we hereby expedite issuance of certified copy, and pay over the remaining amount to respondent -Rajendra Bansal within two weeks of receiving the authenticated copy.

(RAJESH S PATIL, J.)

(K.R. SHRIRAM, J.)