

CIVIL APPEAL

Present: The Hon'ble Justice Tapan Kumar Dutt

Judgment on 26.08.2010

F.M.A. 1225 OF 2000

Mecon Limited

- versus -

Sri Swapan Kumar Banerjee & Ors.

Points:

Remand- The disputes raised by the parties are not purely questions of law but those are mixed questions of facts and law- Remand order whether proper- Code of Civil Procedure, 1908 O 41 R 25

Facts:

The plaintiff-respondent No.1 filed a Suit and prayed for a decree for declaring that the respondent No.1 having served the appellant for the period 1st June, 1989 to 8th September, 1995 he is entitled to his remuneration and the appellant cannot deny him such benefits and also a decree for declaration that the termination of the service of the respondent No.1 is illegal and inoperative. Learned Trial Court dismissed the suit. The Learned Lower Appellate Court allowed the appeal and sent the suit back on remand for full trial by the Learned Trial Court after giving opportunities to the parties to adduce evidence both oral and documentary and directed the Learned Trial Court to proceed with the trial in the light of the observations made in the judgement.

Held:

Several points have been raised on behalf of the respective parties which are required to be decided. The Hon'ble Division Bench in the judgement dated 10.05.2000 held that the Learned Lower Appellate Court was justified in

remitting the suit back on remand for a full trial and the said Hon'ble Division Bench was also of the view that Title Suit No. 19 of 1996 does involve the question of financial entitlement of the plaintiff and the said question is a disputed question of fact and such dispute relates to the period before the purported termination of service but the Learned Trial Court did not go into the matter. The said Hon'ble Court was also pleased to observe in the said order dated 10.05.2000 that there are various other points which merit determination by the Learned Trial Court before disposal of the suit in question. It appears to this court that the disputes raised by the parties are not purely questions of law only but these are mixed questions of facts and law. The submission made by the Learned Advocate for the appellant that no useful purpose will be served in remanding the matter back to the Learned Trial Court or that when material is available before the High Court it should decide the appeal or that the plaintiff should not be allowed to fill up the lacuna by adducing further evidence are not tenable in the facts and circumstances of the instant case. In the instant case, as submitted by the Learned Advocate for the plaintiff/respondent, no evidence was adduced on behalf of the respective parties and as such the question of filling up any lacuna in the evidence by the plaintiff does not arise and unless parties are allowed to adduce evidence in support of their respective cases it would be difficult to adjudicate the real disputes between the parties. Since the issues involved between the parties are issues of mixed questions of fact and law it will be fit and proper if the parties are allowed to adduce their respective evidence before the Learned Trial Court and the Learned Trial Court decides all the issues together including the issue with regard to the maintainability of the suit filed by the plaintiff/ respondent. As the parties have not adduced

any evidence it cannot be said that all materials are available before this court to decide the appeal by going into the merits of the plaintiff's claim.

Para 32

Cases cited:

AIR 1988 Madhya Pradesh 247 (Sureshchandra - vs. - Ramchandra Arora); (2009) 5 Supreme Court Cases 694 (State of Assam - vs. - Barak Upatyaka D.U. Karmachari Sanstha); AIR 2008 Supreme Court 2594 (State Bank of India & Ors. - vs. - S. N. Goyal); AIR 1961 Calcutta 108 (Promode Ranjan Roy - vs. - Chairman Life Insurance Corporation of India and other); AIR 1968 Calcutta 371 (Major General Mahabir Shum Sher Jung Bahadur Rana - vs. - Lloyds Bank Ltd. and another); (1999) 3 Supreme Court Cases 161 (Ashwinkumar K. Patel - vs. - Upendra J. Patel and others); 2006(2) CLJ(SC) 156 (Hameed (D) by Lrs. & Ors. - vs. - Kummottummal Kunhi P. P. Amma (D) by Lrs. & Ors.); AIR 1970 Rajasthan 131 (Praduman Kumar - vs. - Girdhari Singh and others); AIR 1973 Patna 184 (Messrs. K. C. Bishwas & Sons and others - vs. - Central Alkusa Colliery Co.); AIR 1961 Supreme Court 808 (C. Mohammad Yunus - vs. - Syed Unnissa and others); AIR 1960 Supreme Court 335 (Mst. Rukhmabai - vs. - Lala Laxminarayan and others); AIR 1925 Calcutta 233 (Ram Sadan Biswas - vs. - Mathura Mohan Hazra and others); AIR 1995 Supreme Court 455 (Smt. Meera Bhanja - vs. - Smt. Nirmala Kumari Choudhury); AIR 1975 Supreme Court 1500 (Chandra Kanta and another - vs. - Sheik Habib); 1984 (2) CLJ 297 (Hindusthan Steel Ltd. - vs. - Rabindra Nath Banerjee)

Mr. M. K. Kundu. For the Appellant

Mr. T. Pal. For the Respondents.

TAPAN KUMAR DUTT, J.

This Court has heard the Learned Advocates for the respective parties.

2. The plaintiff-respondent No.1 filed Title Suit No. 19 of 1996 which was placed before the Learned Assistant District and Sessions Judge, Durgapur. Such suit was filed against the defendant No.1/ appellant and the proforma respondents. In such suit the respondent No.1 prayed for a decree for declaring that the respondent No.1 having served the appellant for the period 1st June, 1989 to 8th September, 1995 he is entitled to his remuneration and the appellant cannot deny him such benefits and also a decree for declaration that the termination of the service of the respondent No.1 is illegal and inoperative. The respondent No.1 further prayed for “a decree for permanent injunction upon the defendant not disturbed”. It further appears that the respondent No.1 had also filed a Title Suit No. 45 of 1996 with a prayer for a decree for an appropriate amount of compensation for the alleged illegal termination of service, non-issue of service certificate and non-payment of arrears salaries. The appellant contested both the suits and ultimately the Learned Trial Court dismissed both the suits. The appellant filed Title Appeal No. 2 of 1998 against the judgement and decree passed in Title Suit No. 19 of 1996 and the appellant filed Title Appeal No. 3 of 1998 against the judgement and decree passed in Title Suit No. 45 of 1996. The Learned Lower Appellate Court allowed the Title Appeal No. 2 of 1998 on contest and dismissed Title Appeal No. 3 of 1998 on contest. The Learned Lower Appellate Court affirmed the judgement and decree passed by the Learned Assistant District Judge, Durgapur in T.S. No. 45 of 1996 and set aside the judgement and decree passed by the Learned Assistant District Judge, Durgapur in T.S. No. 19 of 1996 and sent the suit back on remand for full trial by the Learned Trial Court after giving opportunities to the parties

to adduce evidence both oral and documentary and directed the Learned Trial Court to proceed with the trial in the light of the observations made in the impugned judgement.

3. The appellant has preferred the appeal challenging the order of remand passed by the Learned Additional District Judge, Durgapur in Title Appeal No. 2 of 1998. It will thus appear that the present Appeal being F.M.A. 1225 of 2000 is not concerned with the proceedings arising out of Title Suit No. 45 of 1996. The present appeal is concerned only with the proceedings arising out of Title Suit No.19 of 1996.

4. The present appeal earlier came up for hearing before a Division Bench of this Court when the said Hon'ble Court by an order dated 10.05.2000 was pleased to observe that the Learned Lower Appellate Court was justified in remitting the suit back on remand for a full trial and the present appeal was accordingly dismissed.

5. The Hon'ble Court was pleased to observe that the dispute involved in T.S. 9 of 1996 is with regard to financial entitlement of the plaintiff and such dispute relates to a period before the purported termination of service. Their Lordships were pleased to observe that as the Learned Trial Court did not go into the matter the Learned 1st Appellate Court was justified in remitting the suit back on remand at least on that ground. Their Lordships were also pleased to observe that it should not be presumed that the plaintiff would not make a further prayer for recovery of the amount by way of amendment of the plaint at a proper stage. The Hon'ble Court was further pleased to find that it had not been decided by the Learned Court as to whether the plaintiff's service was terminated before the service of the order of transfer upon the plaintiff, and there are various other points which merit

determination by the Learned Court below before disposal of the suit and that it would be expedient to decide all the issues after a full hearing.

6. The appellant/petitioner filed an application for review and an Hon'ble Division Bench by order dated 07.05.2003 allowed the application of review and was pleased to direct that the earlier appellate order dated 10.05.2000 shall be reviewed and accordingly it shall not be further acted upon or proceeded with in any manner until the review is over. Their Lordships were further pleased to direct that the appeal from the impugned judgement dated 16.11.99 be set down for hearing after a stipulated period.

7. The Hon'ble Court while considering the application for review was pleased to observe in its order dated 07.05.2003 that the Appeal Court judgement records that it was alleged by the plaintiff that the transfer order of his to Orissa was served on him on 29th September, 1995 but such recording is a clear mistake on the record of the said judgement as the plaintiff never alleged that the transfer order had been served on him on 29.09.1995. In the said Order dated 07.05.2003 the Hon'ble Court was pleased to record that in the appellate order dated 10.05.2000 the earlier court of appeal mentioned that the Trial Court is to determine whether the transfer order had been served after the termination of service. According to the Hon'ble Court which decided the application for review such statement clearly revealed that the earlier court of appeal harboured the impression that the transfer order was served after 09.09.1995 i.e. the date of termination of service. The said Hon'ble Court was further pleased to observe in the order dated 07.05.2003 that it is quite within the possibilities that a person succeeds on its application for review but fails at the time of review once again and that after the second hearing of review it would be for the court, in

this case the court of appeal, to decide whether it will maintain the earlier order or pass some other order.

8. It appears from the order dated 10.05.2000 passed by the Hon'ble Division Bench, as aforesaid, that the Hon'ble Court was pleased to find that it cannot be disputed that so far as prayer (a) in Title Suit No. 19 of 1996 is concerned it deals with financial entitlement of the plaintiff and the same is a disputed question of fact and, moreover, such a dispute related to the period before the purported termination of service. According to the Hon'ble Court as the Learned Trial Court did not go into the matter the Learned First Appellate Court was justified in remitting the suit back on remand at least on that ground. The Hon'ble Court was further pleased to observe that it should not be presumed that the plaintiff would not make a further prayer for recovery of the amount by way of amendment of the plaint at a proper stage.

9. As the Hon'ble Division Bench while considering the application for review has already observed that it was a mistake on the part of the Court to be under the impression that the transfer order was served upon the plaintiff/respondent on 29th September, 1995, no further discussion is necessary in this regard and this court need not deal with this question any further as it will appear from records that the plaintiff/respondent cannot be allowed to take the point that the order of termination of service was served upon him after the date of termination of his service.

10. This court is of the view that even though the plaintiff/ respondent cannot be allowed to take the point that the order of termination of service was served upon him after the date of termination of his service, the prayer (a) of the plaintiff in his Title Suit No. 19 of 1996 still remains unanswered and the Hon'ble Division Bench while deciding the appeal by its judgement dated 10.05.2000 had already found that the period of dispute contained in

prayer (a) of the said suit relates to the period before the purported termination of service and as the Learned Trial Court did not go into the matter the Learned First Appellate Court was justified in remitting the suit back on remand at least on that ground. Of course, the said Hon'ble Division Bench was also pleased to observe that there are various other points which merit determination by the Learned Court below before disposal of the suit in question and it would be expedient in the interest of justice to decide all the issues after a full hearing for an effective adjudication of the issues that might be raised before the Learned Trial Judge.

11. The Learned Advocate for the defendant-appellant has raised various points when this matter came up for hearing before this court after the application for review was disposed of by the Hon'ble Division Bench by the order dated 07.05.2003. The Learned Advocate for the defendant-appellant submitted that the plaintiff/ respondent is estopped by his conduct from challenging the order of termination; the Learned Civil Court cannot decide anything contrary to the order passed in the writ jurisdiction; it would be an empty formality if the matter is remanded back to the Learned Trial Court; the plaintiff/ respondent's suit is not maintainable since it seeks enforcement of a contract for service and it does not come within the exceptions envisaged under the law; even if the defendant-appellant is a state under Article 12 of the Constitution of India the plaintiff/respondent is not a government employee; remand of a case should not be allowed to fill up the lacuna; the plaintiff/respondent's suit is barred under Section 34 of the Specific Relief Act and to avoid delay this court should decide the case on the basis of available record without allowing any remand of the matter.

12. The Learned Advocate for the defendant-appellant has cited some reported decisions also.

13. He cited a decision reported at AIR 1988 Madhya Pradesh 247 (Sureshchandra - vs. - Ramchandra Arora) and referred to paragraph 9 of the said reports in support of his contention that no useful purpose will be served by remanding the matter when the issue can be decided on admitted facts.

14. He cited another decision reported at (2009) 5 Supreme Court Cases 694 (State of Assam - vs. - Barak Upatyaka D.U. Karmachari Sanstha) in support of his contention that even if the defendant-appellant answers the definition of a State it does not make it the State Government and the plaintiff/respondent does not become a holder of a civil post or an employee of the State Government.

15. The said Learned Advocate cited another decision reported at AIR 2008 Supreme Court 2594 (State Bank of India & Ors. - vs. - S. N. Goyal) and referred to paragraph 11 of the said reports in support of his contention that a contract of personal service is not enforceable in a court of law except under three circumstances.

16. The said Learned Advocate cited a decision reported at AIR 1961 Calcutta 108 (Promode Ranjan Roy - vs. - Chairman Life Insurance Corporation of India and other) in support of his submission that since the plaintiff/respondent has already received the Provident Fund and gratuity amount, the plaintiff/respondent cannot now be permitted to challenge the order of termination of his service.

17. The said Learned Advocate cited the decision reported at AIR 1968 Calcutta 371 (Major General Mahabir Shum Sher Jung Bahadur Rana - vs. - Lloyds Bank Ltd. and another) in support of his contention that a declaration which affects only pecuniary relationship could not come within the purview of Section 42 of the Specific Relief Act.

18. The said Learned Advocate cited another decision reported at (1999) 3 Supreme Court Cases 161 (Ashwinkumar K. Patel - vs. - Upendra J. Patel and others) in support of his contention that when the material is available before the High Court, it should itself decide the appeal and not remand the matter back to the Learned Court below.

19 The said Learned Advocate cited another decision reported at 2006(2) CLJ(SC) 156 (Hameed (D) by Lrs. & Ors. - vs. - Kummottummam Kunhi P. P. Amma (D) by Lrs. & Ors.) in support of his contention that the matter should not be remanded back to the court below concerned to enable the plaintiff/respondent to fill up any lacuna.

20. The Learned Advocate appearing on behalf of the defendant-appellant cited a decision reported at AIR 1970 Rajasthan 131 (Praduman Kumar - vs. - Girdhari Singh and others) and referred to paragraph 4 of the said reports in support of his contention that under Order 14 Rule 2 C.P.C. where issues are purely of law which do not require any investigation into facts and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it is incumbent upon the court to determine the issues of law first.

21. He cited another decision reported at AIR 1973 Patna 184 (Messrs. K. C. Bishwas & Sons and others - vs. - Central Alkusa Colliery Co.) while submitting that if the suit can be disposed of on the issue of maintainability alone it would not be necessary to embark upon an elaborate inquiry into the merits of the plaintiff's claim.

22. The Learned Advocate for the plaintiff/ respondent submitted that the bar of Section 34 of the Specific Relief Act does not apply in the present case as according to the said Learned Advocate the plaintiff has fulfilled all the conditions 10 under Section 34 of the said Act and the order passed by

the Hon'ble Division Bench on 10.05.2000 should not be disturbed. According to the said Learned Advocate the plaintiff/respondent is a civil-post holder and therefore Article 311 of the Constitution of India applies, and the plaintiff/respondent comes within the exceptions to the general rule regarding enforceability of a contract of service.

23. The said Learned Advocate further contended that it is not correct to hold that the suit is barred under Section 34 of the Specific Relief Act as plaintiff/respondent did make a prayer for permanent injunction even though such prayer was not happily worded. According to the said Learned Advocate the judgement dated 10.05.2000 of the Hon'ble Division Bench did not entirely rest upon on the wrong recording of a date i.e. 29.09.1995 instead of 29.08.1995.

24. According to the said Learned Advocate there is no scope for passing any different order from that which was passed on 10.05.2000 and the Lower Appellate Court rightly remanded the suit. The said Learned Advocate submitted that no evidence was adduced by the parties before the Learned Trial Court.

25. The Learned Advocate for the plaintiff/ respondent submitted that the reported cases cited on behalf of the defendant-appellant can be distinguished on the basis that in those reported cases decisions were taken after evidences were adduced on behalf of the parties but in the present case no evidence has been led by any of the parties. According to the said Learned Advocate the question of filling up any lacuna in the evidences does not arise since the parties have not adduced any evidence before the Learned Trial Court. The said Learned Advocate subsequently submitted that in the present case Section 34 of the Specific Relief Act does not create a bar and in such circumstances it may not be necessary to consider any of the

exceptional cases envisaged under the law. He has further submitted that the plaintiff can amend his pleadings and lead appropriate evidence.

26. The said Learned Advocate cited a decision reported at AIR 1961 Supreme Court 808 (C. Mohammad Yunus - vs. - Syed Unnissa and others) in support of his contention that the suit for declaration with the consequential relief for injunction is not a suit for declaration simpliciter but it is a suit for declaration with further relief.

27. He cited another decision reported at AIR 1960 Supreme Court 335 (Mst. Rukhmabai - vs. - Lala Laxminarayan and others) in support of his contention that it is a well-settled rule of practice that the suit should not be dismissed automatically but the plaintiff should be allowed to make the necessary amendments if he seeks to do so.

28. The said Learned Advocate cited another decision reported at AIR 1925 Calcutta 233 (Ram Sadan Biswas - vs. - Mathura Mohan Hazra and others) in support of his contention that the plaintiff cannot be compelled to sue for all the reliefs which could possibly be granted or debar the plaintiff from obtaining a relief which he wants unless at the same time he asked for a relief which he does not want.

29. The said Learned Advocate cited a decision reported at AIR 1995 Supreme Court 455 (Smt. Meera Bhanja - vs. - Smt. Nirmala Kumari Choudhury) and referred to paragraph 8 of the reports in support of his contention that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 C.P.C.

30. The Learned Advocate of the plaintiff/ respondent cited another decision reported at AIR 1975 Supreme Court 1500 (Chandra Kanta and another - vs. - Sheik Habib) in support of his submission that a review of a

judgement can only be proper when there is a glaring omission or patent mistake or a grave error in such judgement.

31. The said Learned Advocate cited another decision reported at 1984 (2) CLJ 297 (Hindusthan Steel Ltd. - vs. - Rabindra Nath Banerjee) in which it was held that a public corporation, be it a company or a registered society which is an agency or an instrumentality of the State, is regarded as State within the meaning of Article 12 of the Constitution of India and that being the position the employees of the public corporation cannot be deemed to be an ordinary employee and the contract of service between such an employee and the public corporation cannot be regarded to be one of contract of employment between the master and servant.

32. From the discussions made above it will appear that several points have been raised on behalf of the respective parties which are required to be decided. The Hon'ble Division Bench in the judgement dated 10.05.2000 held that the Learned Lower Appellate Court was justified in remitting the suit back on remand for a full trial and the said Hon'ble Division Bench was also of the view that Title Suit No. 19 of 1996 does involve the question of financial entitlement of the plaintiff and the said question is a disputed question of fact and such dispute relates to the period before the purported termination of service but the Learned Trial Court did not go into the matter. The said Hon'ble Court was also pleased to observe in the said order dated 10.05.2000 that there are various other points which merit determination by the Learned Trial Court before disposal of the suit in question. It appears to this court that the disputes raised by the parties are not purely questions of law only but these are mixed questions of facts and law. The submission made by the Learned Advocate for the appellant that no useful purpose will be served in remanding the matter back to the Learned Trial Court or that

when material is available before the High Court it should decide the appeal or that the plaintiff should not be allowed to fill up the lacuna by adducing further evidence are not tenable in the facts and circumstances of the instant case. In the instant case, as submitted by the Learned Advocate for the plaintiff/respondent, no evidence was adduced on behalf of the respective parties and as such the question of filling up any lacuna in the evidence by the plaintiff does not arise and unless parties are allowed to adduce evidence in support of their respective cases it would be difficult to adjudicate the real disputes between the parties. Since the issues involved between the parties are issues of mixed questions of fact and law it will be fit and proper if the parties are allowed to adduce their respective evidence before the Learned Trial Court and the Learned Trial Court decides all the issues together including the issue with regard to the maintainability of the suit filed by the plaintiff/ respondent. As the parties have not adduced any evidence it cannot be said that all materials are available before this court to decide the appeal by going into the merits of the plaintiff's claim.

33. In view of the discussions made above, this court is of the view that the Learned Lower Appellate Court was justified in sending the suit back on remand for full trial by the Learned Trial Court after giving opportunities to the parties to adduce evidence both oral and documentary. This Court does not find any merit in the appeal which is, accordingly, dismissed. It is, however, made clear that the Learned Trial Court will not be influenced by any of the observations, if any, made in the present judgement and/or order and the Learned Trial Court shall be free to decide upon the merits of the suit independently in accordance with law.

34. There shall, however, be no order as to costs.

35. Urgent Xerox certified copy of this judgment, if applied for, shall be given to the parties on compliance of usual formalities.

(TAPAN KUMAR DUTT, J.)

