HIGH COURT OF MADRAS

TOSHNIWAL BROTHERS (P) LIMITED
V/S
ESWARPRASAD, E

Date of Decision: 18 January 1996

Citation: 1996 LawSuit(Mad) 37

Hon'ble Judges: D Raju

Case Type: Second Appeal

Case No: 1803 and 1982, 178 and 2116 and 1983, 1717 and 1986 and 1291 and 1987

Subject: Contract

Acts Referred:
Contract Act, 1872 Sec 74

Advocates: Himmatmal Mardia, O Kdevi

Judgement Text:-

[1] This batch of second appeals may be dealt with together, since they involve similar and identical issues based on almost identical circumstances, except certain special and individual features present in one case. That apart, the appellants in all these appeals are one and the same. The relevant facts in each of the appeals may be considerably referred to appreciate the contention raised in all these appeals.

[2] Second Appeal No. 1803 of 1982 : The appellant/plaintiff filed Original Suit No. 531 of 1972 against the respondent/defendant for recovery of Rs. 2,000 being the amount said to be due by way of damages for breach of contract, claimed to have been

executed between the parties on September 18, 1969 for three years. Commencing from September 1, 1969 to serve under plaintiff's employment as Sales Engineer, with further interest and costs. The claim of the plantiff is that the defendant was employed as Sales Engineer, on September 1, 1969, that an agreement was executed on September 18, 1969 as per which the defendant should have served the plaintiff for at least three years, that the defendant committed breach of conditions of the agreement and left the service in April 1971 without the consent of the plaintiff and that therefore, the plaintiff is entitled to recover a sum of Rs. 2.000 as damages. The defendant claimed that it is the plaintiff, who made it impossible for the defendant to continue in the service of the plaintiff and that the clause providing for payment of damages is more in the nature of a condition in terrorem and not enforceable. The learned trial Judge framed four issues and purporting to apply the principles contained in Section 74 of the Indian Contract Act, decreed the suit as prayed for. The trial Court came to the conclusion that the defendant committed breach of the contract. The defendant filed an appeal in A.S. No. 41 of 1981 and the lower appellate Court applying decisions in Union of India v. Rampur Distillery and Chemicals Company Ltd. ; Ramaswamy Gounder v. Kupuswamy Gounder 1978 2 MLJ 313 etc. reverted the judgment and decree of the trial Court holding that in the absence of proof of actual damages suffered, there is no scope for granting a decree in favour of the plaintiff. Hence, the above second appeal.

[3] Second Appeal No. 178 of 1983 : The appellant/plaintiff filed Original Suit No. 821 of 1976 for recovering a sum of Rs. 3,000 said to be liquidated damages due to the plaintiff under the agreement, dated November 17, 1973, is whereunder the defendant, who was appointed as Sales Engineer and agreed to serve the plaintiff for 3 1/2 years and in default to pay Rs. 3,000 as liquidated damages, committed a breach by resigning from the employment under a letter, dated January 5, 1975. The defendant contested the claim on the ground that he was placed under probation for a period of six months to be confined thereafter or to extend the probation and since neither of these has been done by the plaintiff, the defendant cannot be attributed with breach of the contract and if at all, it is the plaintiff, who has committed breach. It was also contended that the letter of confirmation was antidated and that the plaintiff is not entitled to any damages whatsoever. The trial Court by its judgment and decree, dated October 13, 1979, held that the plaintiff failed to prove that it has suffered actual damages, though there was a breach on the part of the defendant. On appeal before the learned First Appellate Judge in A.S. No. 166 of 1981 the judgment and decree of the trial Court came to be confirmed. Hence, the above second appeal.

[4] Second Appeal No. 2116 of 1983 : The appellant herein filed Original Suit No. 6324

of 1977 praying for the recovery of a sum of Rs. 2,000 together with interest on account of the breach of contract said to have been committed by the defendant, who left the services of the plaintiff on October 11, 1976, though as per the agreement entered into between parties, the defendant had undertaken to serve the plaintiff for 3 1/2 years from August 11, 1975. The defendant, while disputing his liability, made a counter claim for a sum of Rs. 1,000 said to have been deposited by way of security deposit with the plaintiff. The trial Court by its judgment and decree, dated July 28, 1987, dismissed the suit on the ground that the plaintiff has failed to prove that it has suffered damages. At the same time, since the claim of the defendant about the deposit has been admitted by the plaintiff, the counter claim came to be decreed. Aggrieved, the plaintiff filed an appeal before the lower appellate Court in A.S. No. 371 of 1982. The learned First Appellate Judge also confirmed the judgment and decree of the trial Court. Hence, the above second appeal.

[5] Second Appeal No. 1717 of 1986 : The appellant, who was the plaintiff before the trial Court, filed Original Suit No. 4597 of 1982 for recovery of a sum of Rs. 3,000 together with interest from the respondent purporting to be the damages recoverable under an agreement executed between parties on June 2, 1980 for committing breach of the contract, under which the defendant has agreed to serve the plaintiff-company for a period of five years from the date of appointment, viz., May 22, 1980. The claim was resisted by the defendant on the ground that it is the plaintiff, who has committed breach, in that he was not provided with the nature of employment assured and that the stipulation in the agreement for damages cannot be enforced against the defendant. The trial Court by its judgment and decree, dated September 30, 1983, dismissed the suit holding that the clause provided for damages is not enforceable, the same being a clause in terrorem without reference to any estimated and established damages for the breach. Aggrieved, the plaintiff filed an appeal before the Lower Appellate Court in A.S. No. 625 of 1985 and the learned first Appellate Judge also confirmed the judgment and decree of the trial Court and dismissed the appeal. Hence, the above second appeal.

[6] Second Appeal No. 1291 of 1987 : The appellant, who was the plaintiff in the trial Court, filed Original Suit No. 5323 of 1980 for recovery of a sum of Rs. 25,000 for the amount spent and expenses incurred on the training of the first defendant for having committed the breach of the agreement, dated May 27, 1978, in failing to serve as agreed for a minimum period of three years under the plaintiff. It has been stated that a sum of Rs. 25,625.80 has actually been spent on the first defendant for sending him for training abroad and that the plaintiff is entitled to a decree for the recovery of the same, the first defendant having failed to serve the plaintiff for the agreed period. The first

defendant disputed the claim on the ground that he has not been sent abroad for training, but for augumenting the business prospects of the plaintiff, though initially the first defendant appears to have admitted the fact about the first defendant having been sent abroad for training. During the course of the trial, oral and documentary evidence was marked. None of the defendants entered into the box to give evidence. The second defendant stood surety to the first defendant. The trial Court by its judgment and decree dated, October 6, 1983, decreed the suit holding that the first defendant had been sent for training at the expense of the plaintiff, that he committed breach in serving the plaintiff as undertaken by him for the contracted period and that therefore, the plaintiff is entitled to the money as claimed. The plea on behalf of the first defendant that he has been allowed to resign and, therefore, could not be saddled with any liability, has been rejected by the trial Court. Aggrieved, the defendants filed an appeal in A.S. No. 287 of 1985. The learned First Appellate Judge partly allowed the appeal by reducing the damages to Rs. 10,000 flat rate, though it was found as a fact even by the learned Judge that the damages suffered were to the tune of Rs. 15,277.70. The Lower Appellate Court came to such conclusion since out of the agreed period the first defendant served the plaintiff for a period of 14 months and that therefore the damages have to be apportioned with reference to the period for which the first defendant has failed to serve only and there is no scope for granting the plaintiff the stipulated damages.

[7] The substantial questions of law that have been considered to arise for consideration in these appeals are as to whether Sections 73 and 74 of the Contract Act differ as to the proof of damages required under these sections and whether in the case of service contract Section 74 of the Contract Act alone will be applicable, and there is no need to prove damages in respect of claims failing under Section 74.

[8] Sri Himmatmal Mardia, learned counsel for the appellant, argued the matter on behalf of the appellant.

[9] Ms. O. K. Sridevi, learned counsel appeared for the Respondent, in Second Appeal No. 2116 of 1983. So far as Second Appeal No. 1291 of 1987 is concerned, the first respondent, though served with notice of the appeal, has not taken steps to enter appearance through any counsel or in person to contest the claim. He has been called absent in Court at the time of last date of hearing as well as today. So far as the second respondent is concerned, the learned counsel for the appellant has made an endorsement on the docket sheet of the case bundle that he is giving up the second respondent. So far as the respondents in Second Appeals Nos. 1803 of 1982, 178 of

1983 and 1717 of 1986 are concerned, though they have been served with notice of the appeals, they have not chosen to enter appearance through any counsel or in person to contest the claim. They were also called absent on the earlier date of hearing as also today.

[10] The differences in factual details apart as noticed earlier, the questions of law arising in all an these cases are one and the same, in that whether the provisions of S. 74 of the Indian Contract Act is applicable to the case on hand and if so, whether the plaintiff, complaining of breach of a contract of the nature to which S. 74 could be applied, is entitled to a decree for damages without proof of any actual damages. The relative scope, purport and effect of Ss. 73, 74 and 75 has been the subject-matter of consideration by several judicial pronouncements. It would be useful to advert to some of those cases as also the cases pertaining to the service contract themselves, which have been placed for my consideration by the learned counsel appearing on either side.

[11] In Fateh Chand v. Balkishan Dass, , a Constitution Bench of the Apex Court had an occasion to deal with the scope of S. 74. It was held therein that S. 74 of the Indian Contract Act is clearly an attempt to eliminate the somewhat elaborate refinements made under the English Common Law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. In dealing with the question of a breach of stipulation by way of penalty, it was held that S. 74 entitles the aggrieved party to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach and by so stipulating it merely dispenses with proof of "actual loss or damage", but at the same time it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded only to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

[12] In Shah Singh v. State of Mysore, , the Apex Court was dealing with a service contract, wherein a scholar obtaining scholarship for studies abroad and undertaking to return and serve the Government for a period of five years, committing a breach of the contract. In the said context, the Court held that the penal clause provided under the bond is liable to be enforced and the defaulter must reimburse the Government of the sum stipulated, which comprised of the amounts received by him as scholarship, passage money and all other amounts that were advanced to him up to the date of his return from abroad.

[13] In Union of India v. Rampur Distillery and Chemical Company Ltd., (supra) scope of S. 74 once again came up for consideration before the Apex Court. Their Lordships of the Supreme Court after adverting to the decision in Maula Bux v. Union of India , held that the plaintiffs in those proceedings, having made no attempt to establish that they suffered any loss or damage on account of the breach committed by the defendants, ought to fail particularly when the breach of contract in that case was not shown to have resulted in any loss to the appellate/plaintiffs.

[14] In B. N. Mathur v. Union of India , a Division Bench of this Court has an occasion to deal with a claim for damage made by the Government but disputed by the defendant, arising out of a bond executed in respect of a licence to import a foreign car with a condition to re-export the same within a stipulated time. When breach of the said condition occurred, their Lordships of the Division Bench adverted to the earlier decision of the Single Judge, in Special Officer, Amaravathi Co-operative Sugar Mills v. Thirumalaswamy 1973 2 M.L.J. 361, and accorded approval to the proposition of law laid down therein by the learned Single Judge in the following terms.

> "After considering the decisions of the Supreme Court and/certain other decisions, the judgment concluded -
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> "..... having regard to the express language contained in S. 74 of the Indian Contract Act, and the various decisions of the Courts referred to above, in a case to which S. 74 of the Indian Contract Act applies, the party claiming compensation need not prove that he has actually suffered any loss or damages, and he is entitled to claim reasonable compensation solely because breach of the contract has been committed by the other party and the parties themselves have agreed to the payment of a particular sum, whether it is called 'damage' or 'penalty' in the event of a breach and that the only restriction which the law imposes is that the reasonable compensation to be assessed or computed by the Court cannot exceed the amount agreed to by the parties, whether by way of damages or by way of penalty. To contend that even in such circumstances, the party claiming compensation must prove that he has actually suffered loss or damage is to fly at the fact of the express language contained in S. 74 of the Indian Contract Act and to ignore the same altogether. If the plaintiff actually proves the extent of loss or damage sustained by him as a result of the breach committed by the other party, it would certainly constitute relevant material to be taken into account

by the Court in assessing the reasonable compensation. But it is far different from saying that he is not entitled to any compensation at all unless he proves that he has actually sustained loss or damage. Where it is established that the plaintiff has not suffered any loss or damage at all, the Court may not award him any substantial amount. But that is far different from denying him the right to claim compensation as provided for by S. 74 of the Indian Contract Act on the ground that he has not actually suffered any loss or damage.

In our opinion, the above extracts from the judgment correctly represent the position of law with reference to Ss. 73, 74 and 75 of the Indian Contract Act."

It may be also pointed out that the said conclusion was arrived at keeping into consideration also the statutory exception provided in S. 74 itself. Further the same ratio or view cannot be said to follow in a case falling outside the said exception without doing violence to the declaration of law made by the Apex Court in the decisions adverted to in Para 20 (infra).

[15] The decision of a Division Bench of the Kerala High Court in State of Kerala v. United Shippers and Dredgers; was cited by the learned counsel for the respondent in Second Appeal No. 2116 of 1983. It is seen from the decision of the Division Bench of the Kerala High Court that the entire case law on the subject has been considered before coming to the conclusion that in a case where the party complaining of breach of the contract has not suffered any legal injury in the sense of sustaining any loss or damage, there is nothing to recompense, satisfy or make amends and therefore, such claimant will not be entitled to any compensation. Strong reliance appears to have been placed by the Division Bench on the opinion expressed both in (vide supra) and (vide supra). On the relative scope of Ss. 73 to 75, the Division Bench observed as hereunder :

"That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Ss. 73 and 75 of the Act. Section 74 is only supplementary to S. 73 of the Act and it does not make any departure from

the principle behind S. 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of S. 73 of the Act. In a particular case where the contract itself stipulates for payment of a sum of money on the breach of contract or contains any other stipulation for penalty, the principle additionally propounded by S. 74 also will have to be applied and that is why irrespective of the amount stipulated in the contract, the party suffering from the breach is entitled only to reasonable compensation which, however, shall not exceed the amount so stipulated in the contract. Whether it be a contract which stipulated a sum of money as being payable on breach of contract or whether it is a contract which does not contain any such clause, the party complaining of breach of contract cannot successfully claim compensation unless he makes out loss of damage referable to such breach. The best measure of reasonable compensation would of course be the extent of actual loss or damage sustained. If the extent of actual loss or damage sustained is capable of being proved that provides a safe guide for the Court to determine the quantum of reasonable compensation. If quantification of loss or damage is not possible, the party who has suffered on account of the breach is not without remedy. He can still request the Court to assess reasonable compensation on the materials available and award the same to him. The words in S. 74 'whether or not actual damage or loss is proved to have been caused thereby' have been employed to undercourse the departure deliberately made by Indian Legislature from the complicated principles ol English Common Law and also to emphasise that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why S. 74 of the Act deliberately states that what is to be awarded is reasonable compensation. In a case where the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for, there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation."

[16] In P. Nagarajan v. Southern Structurals Ltd., 1996 (2) LLN 810, Hadi, J., had an occasion to deal with the scope of S. 74 of the Indian Contract Act in the context of a suit filed by an employer for the recovery of the damages stipulated in an agreement-service contract. The learned Judge held that though actual damages has not been proved the sum stipulated in the contract towards liquidated damages can be recovered

by the employer for the breach committed by the employee.

[17] In Subir Ghosh v. Indian Iron and Steel Company, 1977 (1) LLN 252, a Division Bench of the Calcutta High Court had an occasion to deal with the scope of S. 74 of the Indian Contract Act, in the context of an apprentice who under-went training under a contract, which contained a stipulation agreeing to serve the company for a particular period of time and to pay a fixed sum of damages in breach thereof. Their Lordships of the Division Bench of the Calcutta High Court took the view that since the stipulation in the agreement was for payment of liquidated damages in breach of the Government, it is immaterial to specifically plead or prove damages and that it is open to the management to sue for the recovery of the liquidated damages.

[18] In Post Graduate I. O. M. Education and Research v. J. S. Gupta, 1984 L & IC 159, a learned Single Judge of the Punjab and Haryana High Court also took a similar view when an Associate Professor of Ophthalmology in a Post Graduate Institute of Medical Education and Research, failed to adhere to the conditions imposed for sanction of leave to go abroad. The learned Judge was of the view that the sum specified in the bond executed therein constituted genuine pre-estimate of damages and that, therefore, is recoverable for the breach of the covenant.

[19] As against the claim of the learned counsel for the appellant that the amount stipulated in the agreement entered into between parties in these cases before me, the plaintiff-management is entitled to recover the stipulated damages, which, according to the learned counsel, is a genuine pre-estimate by the parties of the damages for breach of the contract and that de hors any proof of actual damages suffered otherwise by acceptable evidence, the plaintiff-management is entitled to recover the stipulated or liquidated damages as specified in the agreement, the learned counsel for the respondent in Second Appeal No. 2116 of 1983 contended that even in such a case the need for substantial pleading or proving the sufferance of actual damage cannot be dispensed with or given totally a go-by and that what is entitled for a claimant even in such cases is only a reasonable damage claimed and substantiated to have been suffered actually by the plaintiff before Court.

[20] I have carefully considered the submissions of the learned counsel appearing on either side. The decision of the Division Bench of Calcutta High Court as also the decision ofthe Single Judge of the Punjab and Haryana High Court relied upon by the appellants, do not accord, in my view, with the ratio of the decisions of the Supreme Court referred to above. So far as the decision of the Division Bench of this Court in , is

concerned, it merely turned on the exception to S. 74 and the decision in 1973 2 M.L.J. 361 (vide supra), which had the approval in this decision did not advert to the aspect of legal injury, the existence of which has been considered to be an essential prerequisite before saddling with liability even under S. 74 of the Indian Contract Act emphasised by the Supreme Court in and (vide supra), apparently on account of the fact that the fact situation presented in 1973 2 M.L.J. 361 and (vide supra), case proceeded on that hypothesis the existence of legal injury rendering it unnecessary to advert to the said aspect unlike in these cases before me which requires a definite consideration of the matter in the perspective and background of legal injury too. In my view, the decisions of the Apex Court referred to above would go to show in most unmistakable terms and force that what has been dispensed with under the provisions of S. 74 even in a case to which it applies is the proof of actual loss or damage, and it does not justify the award of compensation whether a legal injury has resulted in consequence of the breach or not since compensation is only awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. That being the position well settled and firmly fixed and declared by more than one decision of the Apex Court, it becomes necessary in each case for the Court concerned to consider as to whether a legal injury could be said to have resulted as a consequence of breach complained of in a case before the Court to justify the award of reasonable compensation or damages as estimated by the parties. Legal injury, in my view, could be safely presumed to have resulted in a case where the employer or the management concerned was shown to have either incurred any expenditure or involved itself into financial commitments to either give any special training either within the country or abroad or in having conferred any special benefit or favour to the detriment of the claimant in favour of the violater involving monetary commitments, though an actual damage after the alleged violation or breach of the contract was shown to have separately resulted or not. To illustrate this aspect the claim which is the subject-matter of Second Appeal No. 1291 of 1987 itself may be taken up for consideration. The first defendant has been after selection sent abroad by the plaintiff-management and the management incurred an expenditure of Rs. 25,625.80 for the said purpose on various aspects, and though after obtaining such training at the expense of the management, the first defendant undertook to serve the plaintiff for atleast a minimum period of three years undertaking default to pay a stipulated sum of Rs. 25,000 the first defendant has committed a breach of the undertaking when he left the services of the plaintiff after serving for 14 months only as against the contracted period of three years. In such a case, it becomes unnecessary for the plaintiff to prove separately any post-breach damages. On the other hand, it

would suffice to substantiate the fact that the first defendant was the beneficiary of any special favour or concession or training at the cost and expense wholly or in part of the employer and there had been a breach of the undertaking by the beneficiary of the same. In such cases, the breach would per se constitute the required legal injury resulting for the plaintiff-management, out of the breach or violation.

[21] So far as the other appeals are concerned, though the claim has been made on behalf of the plaintiff that the defendants/respondents have been placed on probation and have been given a training, nothing has been specified to demonstrate before the Court about the details of any such special or privileged training or favour of concession having been shown to the defendants to presume any legal injury automatically resulting from the breach of the commitment to serve for a minimum period by such defendants. Apparently, the probationary training may be or might have been the training given to the incumbents to acciamatize themselves to the nature of work, they will have to perform under the employer and nothing more. The Courts below cannot be considered to have committed any error, in such cases in the absence of any special pleading or proof of any such commitments and expenditure having been made or incurred by the plaintiffs to their detriment to infer any legal injury from the mere default or breach committed by the employees concerned. In view of the above, and in the absence of any factual plea or proof for substantiating such legal injury to justify the claim for the damages claimed in the suits no exception could be taken to the judgments and decrees of the Court in the above appeals except the appeal in Second Appeal No. 1291 of 1987 which will be separately considered. Consequently Second Appeals Nos. 1803, 2116, 178 of 1983 and 1717 of 1986 do not call for any interference with Judgments and decrees under challenge in those appeals and they shall stand dismissed. No costs.

[22] So far as Second Appeal No. 1291 of 1987 is concerned, the relevant facts and the principles to be applied in respect of the claim made in this appeal have been already adverted, to. In my view, the trial Court was right in decreeing this suit as prayed for by applying the correct principles of law. The lower appellate Court has committed a grave error in reversing the judgment and decree partly and sustaining only the decree to the tune of Rs. 10,000 notwithstanding the fact that even as per the assessment made by the lower appellate Court the plaintiff could be held to have suffered damages to the tune of Rs. 15,227.70. The reasoning of the lower appellate Court to so redetermine the quantum of damages taking into account the fact that the first defendant has served as against the contracted period for at least 14 months cannot be approved or considered to be the correct understanding of law. The contract and the stipulation for a minimum

guaranteed period of service has to be viewed as a whole and cannot be split into compartments to justify any reduction of penalty as though the first defendant employee is entitled to set off a portion of the claim by pleading part satisfaction. The plaintiffs having substantiated their claim about spending about Rs. 25,625.80 for sending the first defendant abroad for training and the first defendant having obtained the benefit of the training and committed default has to make good the plaintiff of the stipulated and pre-estimated damages of Rs. 25,000 mutually agreed between parties. The first defendant though appears to have at a later stage disputed the nature of training was earlier shown to have admitted the factum of training and the benefit he acquired at the expense of the plaintiff. The claim subsequently projected as though the first defendant was not sent for training but the same was but for augumenting the business prospects of the plaintiff company appears to be a far-fetched one and has not been properly or sufficiently established. The failure of the first defendant to get into the box to give any oral evidence would per se disprove the patently frivolous plea projected at the later stage and driving the course of the proceedings. The judgment and decree of the lower appellate Court, in so far as it altered the judgment and decree of the trial Court, therefore, is liable to be and is hereby set aside and the judgment and decree of the trial Court shall stand restored with costs in this Court.

[23] Order accordingly.