Supreme Court of India
Ashok Kumar Srivastav vs National Insurance Company, ... on 27 April, 1998
Author: Thomas
Bench: A.S. Anand, K.T. Thomas

PETITIONER:
ASHOK KUMAR SRIVASTAV

Vs.

RESPONDENT:
NATIONAL INSURANCE COMPANY, LIMITED & ORS.

DATE OF JUDGMENT: 27/04/1998

BENCH:
A.S. ANAND, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T THOMAS, J.

Special leave granted.

Appellant claims to be still in the service of National Insurance Company Limited (respondent) as a probationary Inspector on a contention that the order passed by the respondent on 13.31982 terminating his probation is bad in law. He succeeded in the trial court where he filed the suit for a declaratory decree and also in the first appellate court, but he was non-suited by the High Court in the second appeal filed by the respondent. Hence he has come up in this Court with this appeal.

Appellant was appointed as Inspector on probation at Khalidabad under the Gorakhpur branch of the respondent Company with effect from 19.91980, initially for a period of twelve months subject to certain conditions. On 13.3.1982 respondent-company served upon him thirty days notice of termination of his service on the premise that appellants falled to achieve the targeted premium amount.

Appellant filed the suit in the Munsif's Court Gorakhpur for a decree declaring that the said notice of termination is illegal and void and that he continues to be in service of the Company with all the

benefits flowing from the post. Respondent-company contested the suit by filling a written statement in which it was contended, inter alia, that the suit is not maintainable under Section 34 of the Specific Relief Act (for short `the Act') and that the notice of termination of the appellant is legal and valid.

However, respondent-company did not participate during evidence stage and hence the trial court proceeded with the suit ex-parte and a decree was passed in terms of the plaint on 25.1.1991. Appellant took out execution proceedings in which he claimed a sum of Rs. 1,02,861/- as arrears of pay due to him from the date of notice of termination. Respondent resisted the execution by putting-forth various contentions including that the decree in unenforceable and void as the same was passed without jurisdiction. The execution court has replied all such objections by its order dated 7.9.1991.

Respondent challenged the said order by means of a writ petition filed under Article 226 and 227 of the Constitution. High Court of Allahabad dismissed the writ petition holding that the decree was passed by a court having jurisdiction and, that the suit was maintainable under Section 34 of the Act.

It was thereafter that the respondent-company preferred a first appeal before the Court of Civil Judge (Senior Division) Gorakhpur challenging the decree of the trial court. When that appeal was dismissed respondent-company preferred a second appeal before the High Court of Allahabad. Four questions were formulated by the respondent- Company in the second appeal and pressed them into service as substantial questions of law. They are : (1) Whether the termination order is violative of the contractual term that one month's notice or pay in lieu thereof is sine qua non; (2) whether appellant is entitled to reinstatement without entering upon a finding that there was statutory violation ; (3) whether the suit is barred under the Industrial Disputes Act; (4) whether the suit is barred under section 34 of the Act.

High Court did not permit the respondent-Company to pursue with the last two questions on the premise that those questions were finally decided in the writ petition and such decision will operate as a bar of res-judicate. However, learned Single Judge of the High Court proceeded to consider the other two questions and held that non-payment of one month's pay in lieu of the notice would not vitiate the termination order and that at any rate, appellant is not entitled to continue as a Probationary Inspector. Resultantly, the High Court reversed the decree of the trial court and dismissed the suit.

Learned counsel for the respondent-company once again convassed for acceptance of the argument that the suit is not maintainable in view of Section 34 of the Act. But in view of the clear finding rendered by the High Court in the judgment dismissing the writ petition that such a suit for declaration is maintainable before a civil court, the first appellate court did not go into that question.

In the second appeal, respondent's counsel repeated the contention but learned Single Judge of the High Court, who disposed of the second appeal, did not allow the respondent to re-agitate the said

question on the premise that the decision rendered in the writ petition on that point would operate as res judicata. Undeterred by such repeated repudiation of the contention, learned counsel for the respondent made an endeavour to convince us that the suit is not maintainable on the same ground.

It is well neigh settled that a decision on an issue raised in writ petition under Article 226 or Article 32 of the Constitution would also operate as res judicata between the same parties in subsequent judicial proceedings. The only exception is that the rule of res judicata would not operate to the detriment or impairment of a fundamental right. A Constitution Bench of this Court has considered the applicability of rule of res judicata in writ proceedings under Article 32 of the Constitution in Daryao & ors. vs. State of U.P. & ors. [1962 (1) SCR 574] and it was held that the basis on which the rule rests is founded on consideration of public policy and it is in the interest of public at large that a finality should attach to the binding decision pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over in the same kind of litigation.

This was relterated by another Constitution Bench of this Court in The Amalgamated Coalfields Ltd. vs. The Janapada Sabha, Chhindwara [1963 Supple (1) SCR 172]. The following is the ratio : "Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Art. 32 or Art. 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Art.32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India.

Though the above has now become an a accepted legal position [vide G.K. Sharam & ors. vs. S.D. Sharma & ors. (1986 Supple. SCC 239), the contention raised here is that since the writ petition was in challenge of an order passed in execution of a decree, the decisions rendered in such writ petition would only remain in the reaim of execution and they would not preclude the parties to the suit from raising such issues over again when the very decree itself is challenged in appeal. The Explanation VII, added to Section 11 of the Code of Civil Procedure as per CPC Amendment Act 104 of 1976 read thus :

> "The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue of former suit shall b e construed as references respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree."

Though the said explanation may not stricto sensu apply to the trial stage, the principle couched in it must gain application thereto. It is immaterial that the writ petition was filed only subsequently because the findings made therein became final as no appeal was filed against the judgement. The basic idea in the rule of res judicata has sprouted from the maxim "nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). In Y.B. Patil & ors vs. Y.L. Patil [1976 (4) SCC 66] a three-Judge Bench of this Court considered the effect of a decision rendered in a writ petition at subsequent stages of the same its. It held : " The principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in

subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding."

Thus, the legal position is clear and the respondent cannot now re-agitate the question regarding maintainability of the suit under Section 34 of the Act. However, learned counsel adopted an alternative contention before us that the suit is in effect one for specific enforcement of a contract and such a suit is not conceived under Section 14 of the Act and hence it is not maintainable. According to the learned counsel, the reliefs claimed in the suit, if granted, would result in specific enforcement of a contract of employment. Section 14(1)(a) of the Act makes it clear that a contract of employment is not specifically enforceable since non performance of can be compensated by money, contended the counsel.

The said contention is based on a fallacious premise that the suit was for enforcement of a contract of employment. Respondent was appointed on certain terms and pursuant to such appointment he worked within the scope of such employment. Termination of his employment purportedly in terms of the same contract is challenged by him by praying for a declaration that such termination is invalid and therefore, he continues in the same employment. Maintainability of a suit cannot be adjudged from the effect which the decree may cause. It can be determined on the basis of the ostensible pleadings made and the stated reliefs claimed in the plaint.

Though Specific Relief Act widens the spheres of the civil court its preamble shows that the Act is not exhaustive of all kinds of specific reliefs. "An Act to define and amend the law relating to certain kinds of specific relief. It is well to remember that the Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields. Even so, the Act does not cover all specific reliefs in a variety of fields. Even so, the Act does not cover all specific reliefs concievable. Its preceding enactment (Specific Relief Act, 1877) was held by the courts in India as not exhaustive. Vide Ramdas Khatavu vs. Atlas Mills (AIR 1931 Born. 151). In Hungerford Investment Trust Ltd. vs. Haridas Mundhra & ors . [1972 (3) SCC 684] this Court observed that Specific Relief Act, 1963, is also not an exhaustive enactment and it does not consolidate the whole law on the subject. "As the preamble would indicate, it is an Act `to define and amend the law relating to certain kinds of specific relief. It does not purport to lay down the law relating to specific relief in all its remifications."

Chapter II contains a fasciculus of rules relating to specific performance of contracts, Section 14 falls within that chapter and it points to contracts which are no specifically enforceable. Powers of the Court to grant declaratory reliefs are adumbrated in Section 34 of the Act which falls under Chapter VI of the Act. It is well to remember that even the wide language contained in Section 34 did not exhaust the powers of the court to grant declaratory reliefs. In Veruareddi Ramaraghava Reddy & ors. vs. Konduru Seshu Reddy & ors. [1966 Supple. SCR 270] and in M/s Supreme General Films Exchange Ltd. vs. His Highness Maharaja Sir Srijnath Singhji Deo of Maihar & ors. [1975 (2) SCC 530] this Court while interpreting the corresponding provision in the preceding enactment of 1877 (Section 42) has observed that "Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in

appropriate cases falling outside Section 42."

The position remains the same under the present Act also. Hence the mere fact that a suit which is not maintainable under Section 14 of the Act is not to persist with its disability of non admission to civil courts even outside t he contours of Chapter II of the Act. Section 34 is enough to open the corridors of civil courts to admit suits filed for a variety of declaratory reliefs.

How the more important question is, whether appellant is entitled to declaration that he continues to be in the employment of respondent-company. High Court held that he is not because the contract of employment does not entitle him to continue.

Terms and conditions of employment of the appellant have been incorporated in the letter of appointment dated 2.12.1980. It contains the following :

> (1) Initially h e would be on probation for a period of 12 months and during that period he has to achieve a premium of at least Rs.
>
> 75,000/- to become eligible for promotion as Probationary Inspector, Grade I.
>
> (2) It appellant falls short of the said target, respondent - company reserved its right to extent the period of probation by another 12 months provided the following conditions are satisfied.
>
> (a) He should have produced a premium amount of Rs. 50,000/- during the first 12 months period.
>
> (b) A request should be made by the appellant in writing for the purpose of getting extension of the period of probation.
>
> (c) The company has discretion to decide whether such request should be granted or not.
>
> (3) Unless a letter appointing him as Probationary Inspector (Grade - I) is issued by the company, before the expiry of the initial probationary period or the extended probationary period (as the case may be) his service shall stand automatically terminated. (4) His service is also liable to be terminated without assigning any reason during probationary period and/or extended period. Appellant has no case that respondent-company has issued any letter appointing him as "Probationary Inspector (Grade -I)" before the expiry of the initial period of 12 months nor has he a case that initial period of probation was further extended at any time.
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> The above being the admitted position, appellant cannot get a declaration that he continues to be in service. Hence the conclusion of the High Court that the suit is liable to be dismissed does not warrant any interference. In the result, we dismiss this

appeal. No costs.