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Court : Allahabad

Decided On : Aug-30-1999

Reported in : 1999(4)AWC3114

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 39, Rules 1, 2, and 2(2) - Order 43, Rule 1; Specific Relief Act - Sections 14 and 41; [Constitution of India](#) - Article 311

Appeal No. : C.M.W.P. No. 35569 of 1999

Appellant : Harendra Pratap Singh and Another

Respondent : iind Additional District Judge, Allahabad and Others

Advocate for Def. : S.C., ;Anil Kumar Singh, Adv.

Advocate for Pet/Ap. : Triloki Nath, Adv.

Judgement :

D. K. Seth, J.

1. The opposite party Nos. 2, 3 and 4 filed O.S. No. 842 of 1999 before the learned Additional Civil Judge, IIIrd Court, Allahabad for the following reliefs :

(a) That by decree of mandatory injunction the defendants be directed not to transfer the plaintiffs from City Allahabad to any other city.

(b) That the cost of the suit be awarded to the plaintiffs.

(c) That any other and further reliefs be also awarded to the plaintiffs against the defendant which the Court deems fit and proper in the interest of justice.

2. In connection with the said suit, the opposite party Nos. 2, 3 and 4 had filed an application for injunction. By an order dated 28th July, 1999 notices were directed to be issued on the petitioner, while the learned trial court was not satisfied that an interim order could be issued before issuing the notice under Rule 3 of Order XXXIX. This order was challenged by the Opposite Party Nos. 2, 3 and 4 in Civil Revision No. 940 of 1999. The learned Additional District Judge, IIrd Court, Allahabad by an order dated 3rd August, 1999 had granted an ad interim injunction till 20th September, 1999 staying the operation of the transfer of the opposite party Nos. 2, 3 and 4 respectively.

3. It is this order, which has since been challenged by Mr. Triloki Nath, learned counsel for the petitioner, on four grounds. The first was that the suit relates to a contract of employment which cannot be enforced in view of Section 14 read with Section 41 of the Specific Relief Act and as such the said suit is not maintainable. The second ground was that the order passed in Order XXXIX, Rule 3 is not a case decided and, therefore, no revision could be maintained under Section 115 of the Code of Civil Procedure. According to him, in case it is held to be a case decided in that event it would in effect amount to refusal to grant of injunction which is then an order within the meaning of Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure and as such the order would be appealable. In case it is not an order within the meaning of Rules 1 and 2 in that event any order passed under Rule 3 cannot come within the purview of a case decided. The last point he argued was that if it is an order under Order XXXIX, Rules 1 and 2 in that event, the revisional court cannot assume jurisdiction and therefore, the revision is also

not maintainable and therefore, no order of ad interim injunction could be issued since the same order would be without jurisdiction.

4. Mr. Anil Kumar Singh appearing on behalf of the opposite parties on the other hand contends that by reason of the decision in the case of Ramendra Kishore Biswas v. State of Tripura and others, (1999) 1 SCC 472, a suit relating to employment cannot be excluded from the jurisdiction of the civil court. Hethen contends that if there is a contract and if there is violation in its term which is patent and ex facie illegal and where no details are to be gone into in that event, a civil suit is very much maintainable, even in respect of certain parts of the contractual obligation arising out of contract of employment. He then contends that the petitioners had come with unclean hands and affirmed in the affidavit filed before this Court alleging that the opposite party Nos. 2, 3 and 4 are not their employees, whereas, the petitioner, before the Labour Court, had admitted the opposite party Nos. 2, 3 and 4 as their employees. Therefore, this petition should be dismissed. Since they have come with unclean hands before this Court, a direction should be issued for proceeding against them under Section 340 of the Code of Criminal Procedure. He then contends that the order that has been passed is for a limited period and is an interlocutory order. Therefore, this Court should not interfere with the same and the writ petition against an interlocutory order in such circumstances cannot be maintained since the petitioners could have opposed the order in the revision itself. He further contends that the order was an order under Order XXXIX, Rule 3 and as such does not come within the purview of Order XLIII, Rule 1 (r) of the Code of Civil Procedure and as such is not appealable. When no appeal is provided, the order is definitely revisable. Refusal to grant injunction is surely a case decided and therefore, the revision is amenable. Accordingly, the order passed by the revisional court is wholly within its jurisdiction and competence. On these grounds, he prays that the writ petition be dismissed.

5. I have heard both the counsel at length.

6. Section 14 of the Specific Relief Act describes the contracts, which cannot be specifically enforced. The enumerations are given in sub-clause (1) clauses (a),

(b), (c) and (d) which are as follows :

'(1) The following contracts cannot be specifically enforced, namely :

(a) a contract for the non-performance of which compensation in money is an adequate relief :

(b) a contract which runs into such minute or numerous details or which is so dependant on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms ;

(c) a contract which is in its nature determinable ;

(d) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.'

7. Admittedly, the plaint disclosed a case that the petitioner is seeking enforcement of the contract of employment which requires personal volition of the parties. In the present case, an order of transfer has since been challenged. The question of work at the transferred place depends on the volition of the opposite parties whereas the question of working at the place from where the transfer was effected depends on the volition of the employer. Thus, allowing the employee either to work at the place of transfer or at the place where he was working depends on the volition either of the employee or of the employer respectively. Thus this question falls within clause (b) of sub-clause 1 of Section 14. This is apparent on the face of the plaint. As such prima facie, it appears that the suit may not be maintainable under Section 14 of the Specific Relief Act. At the same time. Section 41 of the said Act prescribes in which case injunction cannot be granted. Section 41(e) prescribes that the breach of contract the performance of which cannot be specifically enforced are matters in respect of which the injunction cannot be granted.

8. Thus, prima facie, it appears that in the present case, apparently Injunction cannot be granted. Be that as it may, these are questions which relate to the merit of the suit and cannot be gone into at this stage while deciding the questions of

grant of temporary Injunction on art application under Order XXXIX. Rules 1 and 2 of the Code of Civil Procedure. Therefore, the observation made herein are all tentative subject to the final decision in the suit itself when the question will be decided on merit. This observation relates to the purpose of determining the prima facie case for grant of injunction.

9. In the case of Executive Committee of Vaish Degree College. Shamit and others v. Lakshmi Narain and others, AIR 1976 SC 888, the Apex Court took the view that a contract of personal service cannot ordinarily be specifically enforced and the Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service, can be deemed to be in service against the will and consent of the employer. The Apex Court had held that this rule was subject to well recognised exception as enumerated therein. Normally (i) where a public servant is sought to be removed from service in contravention of 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 or violation of the mandatory provisions of the statute.

10. In the present case, the petitioners are neither statutory bodies nor the plaintiff-petitioner is a Government servant and that he is not seeking reinstatement of any relief under the Industrial Law. Therefore, apparently and prima facie, the opposite party Nos. 2, 3 and 4 does not come within the purview of the exception recognised in the case of Vaish Degree College (supra).

11. In the case of Nandganj Sihori Sugar Co. Ltd. Raebareli and another v. Badri Nath Dtxit and others, AIR 1991 SC 1525, the decision in the case of Vaish Degree College (supra) was followed. In the said decision. It was held that the Court do not ordinarily enforce performance of contracts of a personal character, such as a contract of employment while quoting Jessel M. R. :

'The Courts have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relating of master and servant.....' [Rigby v. Connol, (1880) 14 Ch D 482, 487 : See Cheshire. Fitoole and Furmston's - Law of Contract. 11th Ed., p. 614].

12. Then again, reference may be had to the U. P. Amendment of Order XXXIX, Rule 2 of the Code of Civil Procedure by which in Rule 2, in sub-rule (2) a proviso has been added to the extent namely, 'provided that no such injunction shall be granted (a).....(b) to stay the operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of. or taking charge from, any employee including any employee of the Government (c).....'

13. Thus, by reason of the said proviso of sub-rule (2) of Rule 2, Order XXXIX. no Injunction could be granted in favour of the opposite party Nos. 2, 3 and 4. In that view of the matter, the order passed by the revisional court granting ad interim stay during the pendency of the revision cannot be sustained. Since the revision is pending, therefore, it is not necessary to go into the question as to whether a revision is maintainable or not. It would be open to the parties to take all points available to them before the revisional court at the time when the revision would be taken up for hearing. Therefore, with regard to the question of maintainability of the revision as raised by Mr. Triloki Nath and opposed by Mr. Singh need not be gone into at this stage.

14. So far as the decision cited by Mr. Singh in the case of RamendraKishore Biswas (supra), is concerned, the same does not help him. In as much as the jurisdiction of the civil court is not completely ousted in respect of matter relating to employment so far as it seeks declaration that the dismissal is wrongful. But in such case, the remedy cannot be a reinstatement but a relief in the form of damages as has been held by the Apex Court in the earlier decision particularly in the decision of Vaish Degree College (supra). Therefore, that decision does not lay down the ratio that an injunction can be granted staying the operation of the order of transfer in a suit for injunction before the civil court. That apart, in view of the U. P. Amendment of Order XXXIX, Rule 2, sub-rule 2 as observed earlier, this decision is distinguishable and cannot be attracted in the present case at this stage.

15. In such circumstances, the order dated 3rd August, 1999 passed by the learned Additional District Judge, IInd Court. Allahabad in Civil Revision No. 940 of

1999 is modified to the extent by setting aside the ad interim order of injunction staying the operation of the order of transfer.

16. This writ petition is thus allowed. However, there will be no order as to costs.

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