Kayastha Pathshala, Allahabad and Another

Vs

Rajendra Prasad and Another

And

State of U. P. and Another

Vs

Rajendra Prasad and Another

Civil Appeals Nos. 917 and 3592 of 1989

(K. Jagannatha Shetty, A. M. Ahmadi JJ)

08.12.1989

JUDGMENT

JAGANNATHA SHETTY, -

1. This is the third time the matter is coming before this Court and we hope that his is the last of a series of litigations between the parties.

2. We have been helpfully provided with a chronology of the events leading up to this appeal. It is important that the chronology is made clear. It is as follows :

> At Allahabad, there is a private college called "Kulbhaskar Ashram Agriculture Intermediate College". It is run by the "Kayastha Pathshala" which is a society registered under the Society registered under the Societies Registration Act. Rajendra Prasad, the common respondent in the appeals, was a Chemistry lecturer in that College. He was appointed on July 15, 1962 in the scale of Rs. 175-10-215. On June 20, 1963, the management wrote to him stating that his services would not be required after July 15, 1963. It was indeed a termination letter. The respondent moved the civil court with Suit No. 422 of 1963 for permanent injunction restraining the management from interfering with his teaching work. The management resisted the suit inter alia, contending that the respondent was appointed only for one year. He was removed after the period of probation since his work was found to be unsatisfactory. It was also contended that no injunction could be granted for enforcement of the contract of personal service and the suit was not maintainable. On May 20, 1964, the trial court dismissed the suit as not maintainable. It was also held that the suit had become infructuous since the management had withdrawn the impugned communication.

3. It seems that the management had withdrawn its earlier communication only to make another order. On August 28, 1964, the respondent was placed under suspension and he again approached

the civil court for relief. He instituted Suit No. 198 of 1964 in the Munsif Court seeking a declaration that the order of suspension was illegal. The trial court dismissed the suit, but the appeal therefrom, F.A. No. 583 of 1965, was allowed by the First Additional Civil Judge, Allahabad decreeing the suit as prayed for. That decision was affirmed by the High Court in Second Appeal No. 1111 of 1966. The High Court rendered the judgment on April 9, 1968.

4. Before the disposal of the appeal by the High Court, the management made a fresh order suspending the respondent pending enquiry on certain allegations. That order was issued on December 30, 1965/January 7, 1966. This order was also the subject matter of a suit. The respondent filed Civil Suit No. 48 of 1966 in the Munsif Court at Allahabad challenging the competency of the managing committee to take action against him. He also contended that the prior approval of District Inspector of Schools (DIOS) was not taken for placing him under suspension. The Munsif Court accepted the suit and declared that the suspension order was illegal and void. But the management successfully took up the matter in Civil Appeal No. 117 of 1969 before the Additional Civil Judge. The appeal was allowed reversing the trial court decree and upholding the respondent's suspension. The respondent preferred second appeal to the High Court and it was numbered as S.A. No. 2038 of 1970. We may stop here for a moment and refer to some other events.

5. During the pendency of the said second appeal in the High Court, the U.P. Secondary Education Laws (Amendment) Act, 1976, was brought into force with effect from August 18, 1976. The provisions thereunder required the management of the college to take prior approval of DIOS for taking any action against teaching staff. The respondent took advantage of those provision and made an application for amendment of his plaint to incorporate additional paragraphs 13-A and 14(g). In the additional paragraphs, he challenged the validity of the suspensions order since management did not take prior permission of the DIOS. It was alleged that the suspension order became invalid and inoperative on the expiry of 60 days from the date of service.

6. The State of Uttar Pradesh was not a party to the original suit. For the first time, on October 31, 1980 the respondent made an application for impleading the State of U.P. and DIOS as supplemental respondents to the appeal. Their impleading was perhaps necessitated in view of the liability of the State Government to pay salaries to teachers under the U. P. High School and Intermediate College (Payment of Salaries of Teachers and Other Employees) Act, 1971. Section 10(1) of the Act provides that the State Government shall be liable to payment of salaries of teachers and employees of every institution due in respect of any period after March 31, 1971.

7. The High Court did not consider it necessary to allow the said amendment of the plaint. But the respondent succeeded in this Court. By order dated April 20, 1980 the court allowed his appeal and directed the High Court to allow the amendment. The Second Appeal No. 2038 of 1970 thus fell for consideration in the light of fresh points raised in the amplified plaint.

8. Next, as to proximity, there is one other related litigation between the same parties. It is now necessary to refer to it. The respondent filed a suit for recovery of arrears of salary past, pendente lite and future. It was claimed for the period between February 21, 1964 and February 20, 1967. That suit was filed in 1968 and registered as Civil Suit No. 53 of 1968. On July 31, 1969, the trial court decreed the suit for Rs. 7812.92 being the arrears of salary of the period of three years. The management of the college appealed to the District Court in Civil Appeal No. 268 of 1969. The respondent filed a cross objection to the extent of the relief denied to him. The Second Appeal No. 2038 of 1970 was then pending in the High Court. It seems that the parties moved the High Court

for withdrawal of C.A. No. 268 of 1969 from the District Court for being disposed of along with the Second Appeal No. 2038 of 1970. That request was allowed and the said appeal was withdrawn. It was renumbered by the High Court as First Appeal No. 450 of 1982.

9. The High Court disposed of both the said appeals by common judgment dated October 22, 1982. The Second Appeal No. 2038 of 1970 was dismissed confirming the finding of the Additional Civil Judge as to the validity of the suspension order. The First Appeal No. 450 of 1982 was allowed reversing the decree of the trial court and dismissing the respondent's suit for arrears of salary. His claim for pendente lite salary also vanished along with that.

10. The respondent stepped into this Court for second time. Being aggrieved by the decision of the High Court, he appealed to this Court in C.A. No. 5891 of 1983. The appeal was allowed by a brief order dated September 26, 1986 reported as Rajendra Prashad v. Kalthan Pathshala (1987 Supp SCC 37 : 1987 SCC (L&S) 286 : (1987) 4 ATC 196 : AIR 1987 SC 1644). For immediate reference we may set out the same hereunder :

> "The High Court in the judgment recorded the following findings :
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> "The result is, as noticed above, that although it cannot be said that the order dated December 30, 1965/January 7, 1966 suspending the plaintiff from service of the defendant college was illegal or null and void inoperative against the plaintiff from its inception, it did cease to be operative with effect from October 17, 1975 on the expiry of 60 days from the commencement of the U.P. Secondary Education Laws (Amendment) Act, 1975."
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> Having recorded this finding, the High Court refused to exercise its discretion to grant a declaration that the order of suspension ceased to be operative with effect from October 17, 1975. We think that the High Court was wrong in refusing to grant the declaration. We, therefore, declare that the order of suspension ceased to be operative with effect from October 17, 1975. The appeal against the judgment of the High Court in Second Appeal No. 2038 of 1970 is disposed of accordingly.
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> In the appeal against the judgment of the High Court in First Appeal No. 450 of 1982 .... we do not see how the appellant can be denied his salary for the period between February 20, 1964 to January 15, 1966, the date on which the effective order of suspension was communicated to him. Instead of sending the case back to the trial court for determining the amount, we think that a decree may straightway be passed for a sum of Rs. 10,000 which will include salary for the period, interest up to date and costs."

11. With due apologies for this lengthy introduction, we then come to the proceeding out of which the present appeals arise. On May 18, 1986 the respondent moved the High Court under Article 226 of the Constitution seeking a writ of mandamus against the State of U.P. and management of the college for his reinstatement in service with payment of entire arrears of salary. He rested his case on the aforesaid decision. The High Court accepted the writ petition and gave him all the reliefs asked for.

12. As to the validity of suspension order, the High Court remarked :

> "The order of suspension being illegal was correctly set aside by the Supreme Court

> after the enforcement of U.P. Secondary Education Laws (Amendment) Act, 1975 as none of the conditions mentioned in sub-section (5) of Section 16-G of the Act were fulfilled as no charges were framed against the petitioner, nor any charge-sheet was served on him ..... The petitioner, therefore, could not have been suspended and the order of suspension, in our view, was void ab initio. Under law there was no provision to keep the petitioner under suspension for more than 21 years without enquiry being held and without any charge-sheet being submitted. The petitioner has a legal right to continue in service and we direct him to be reinstated forthwith."

13. As regards the arrears of salary, the High Court observed :

> "Once the order of suspension ceased to be operative and was ab initio void from its very inception,, the petitioner shall be deemed to be in continuous service. That application of the petitioner was sent to State of U.P. through the Education Secretary and also the District Inspector of Schools. The District Inspector of Schools has already sent a letter dated January 7, 1987 (Annexure 23) to the Manager, Kulbhaskar Ashram Agriculture Intermediate College, Allahabad about the payment of salary to the petitioner. But the Manager and the State of U.P. do not seem to be interested in making payment of arrears of salary to the petitioner. We are accordingly of the opinion that the petitioner has made out a case for issuance of a writ of mandamus directing the State of U.P. and the District Inspector of Schools, Allahabad to make payment of arrears of salary to the petitioner in view of Section 10 and prior to that date the arrears of pay and other emoluments would be payable by the institution. In case the institution fails to make payment the procedure under Section 11 of the Payment of Wages Act may be adopted."

14. Finally, the High Court issued the following directions :

> "In view of the premises aforesaid, the present petition succeeds and is allowed. Respondents 1 and 2 the State of Uttar Pradesh and the District Inspector of Schools, Allahabad are directed to make payment of salary to the petitioner since January 16, 1966 till date, forthwith including DA and other emoluments admissible under law, of course, after deducting the amount, if any, paid to him as subsistence allowance during the period of his suspension. We further add that the petitioner shall be reinstated forthwith and shall paid his salary regularly in accordance with the provisions of Section 3 of the Payment of Wages Act, 1971."

15. Challenging the judgment of the High Court, the management as well as State Government by obtaining leave have now appealed. This is how the matter is coming before the court for the third time.

16. The first question for consideration is whether the High Court was justified in directing reinstatement of the respondent ? There is a long established rule of courts that service contract cannot be specifically enforced. There are, however, three exceptions which have been adverted to in very many cases. In Vaish Degree College v. Lakshmi Narain ((1976) 2 SCC 58, 71 : 1976 SCC (L&S) 176) after examining a large number of authorities like : S. R. Tiwari v. District Board, Agra ((1964) 3 SCR 55, 59 : AIR 1964 SC 1680 : (1964) 1 LLJ 1); Executive Committee of U.P. Warehousing Corporation Ltd. v. Chandra Kiran Tyagi ((1969) 2 SCC 838 : (1970) 2 SCR 250, 265 : (1970) 1 LLJ 32); Bank of Baroda v. Jewan Lal Mehrotra ((1970) 3 SCC 677 : (1970) 2 LLJ 54)

and Sirsi Municipality v. Cecelia Kom Francis ((1973) 1 SCC 409 : 1973 SCC (L&S) 207 : (1973) 3 SCR 348) the court rounded off the conclusion : (SCC p. 71, para 18)

> "On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a 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. This rule, however, is subject to three well recognised exceptions : (i) where a public servant is sought to be removed from service in contravention of the 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."

17. This decision has been affirmed in Smt. J. Tiwari v. Smt. Jawala Devi Vidya Mandir ((1979) 4 SCC 160 : 1979 SCC (L&S) 356) and reiterated in Deepak Kumar Biswas v. Director of public Instructions ((1987) 2 SCC 252) and adverted to in Andi Mukta Sadguru Shree Muktajee Vandas Swami Survaran Jayanti Mahotsav Samarak Trust v. V. R. Rudani ((1989) 2 SCC 691, 697 : (1989) 2 LLJ 324). These authorities say that a college owned by a private body, though recognised by or affiliated to a Statutory University will not become a statutory body since not enacted by or under a statute. And the dismissed employee of such institution cannot get specific performance of service contract.

18. The submission for the respondent, however, was that the present case stands on a different footing since there was no repudiation of the respondent's contract of service. The contract of service, according to him is still subsisting and it was, therefore, not inappropriate for the High Court to put the respondent back into service. But counsel for the appellants added that the respondent himself has abandoned his post after he was suspended and there was therefore no need to terminate his service. The declaration made by the respondent when he enrolled himself as an advocate in 1968 stating that he was not employed nor engaged in any business or profession was relied upon to support the submission. It is said that the law required that the respondent at the time of enrollment must have given particulars of his employment or of his business or trade if he had one. He must have also produced a character certificate from the employer and proved as to how the employment came to an end. Since he did not furnish any such particulars counsel urged that it was a clear case of abandonment of service and no specific order of termination was necessary.

19. Much could be said on both the contentions, but we refrain from expressing any opinion since this is not a proper case for reinstatement. Indeed, the reinstatement would be an unwise move from any point of view. In educational institutions, the court cannot focus only on the individual forgetting all else. The court must have regard to varying circumstances in the academic atmosphere and radically changed position of the individual sought to be reinstated. The court must have regard to interests of students as well as the institution. It is not unimportant to note that the respondent was not of teaching for over 25 years. He seems to have taught Chemistry for one or two years in 1962 and 1963. Thereafter, he did not teach Chemistry at any time in any college. In 1964-65 be diverted his attention and sought admission in LL. B. Degree Course. In 1968, he enrolled himself as an advocate and since then concentrated only in law courts. In this gap of twenty-five years he must have clearly lost touch with Chemistry as well as art of teaching. It must have been also deeply buried and disintegrated under the new acquisition of his legal knowledge. Reinstatement of such a person seems to be unjustified and uncalled for.

20. The next question for consideration is whether the respondent is entitled to damages or salary as ordered by the High Court and if so what should be the measure for determination ? Counsel for the appellants urged that the respondent's claim for salary was the subject matter of previous litigation which finally ended with a decree by this Court in C.A. No. 5891 of 1983 and it was a final settlement of all his claims. It was also argued that in any event, the respondent is not entitled to damages or salary for more than three years. Our attention was drawn to the decision in Tilokchand Motichand v. H. B. Munshi ((1969) 1 SCC 110 : (1969) 2 SCR 824 : (1970) 25 STC 289).

21. In reply and in support of the High Court order, counsel for the respondent referred to us a number of decisions and in particular (i) Maimoona Khatun v. State of U. P. ((1980) 3 SCC 578 : 1980 SCC (L&S) 464 : (1980) 3 SCR 676); (ii) Managing Director, Uttar Pradesh Warehousing Corporation v. Vinay Narain Vajpayee ((1980) 3 SCC 459 : 1980 SCC (L&S) 453 : (1980) 2 SCR 773) and (iii) Maharaja Sayajirao University of Baroda v. R. S. Thakur ((1988) 1 SCC 638 : 1988 SCC (L&S) 426 : AIR 1988 SC 2112).

22. We have read these cases carefully, but it is not necessary to refer to them in detail when we have guidance from binding precedents in similar cases. There is a trilogy of cases on the question, see : (i) Vaish Degree College ((1976) 2 SCC 58, 71 : 1976 SCC (L&S) 176), (ii) Smt. J. Tiwari ((1979) 4 SCC 160 : 1979 SCC (L&S) 356) and (iii) Deepak Kumar Biswas ((1987) 2 SCC 252) to which brief reference was made earlier. In the first of the three cases, the institution concerned was a degree college managed by a registered co-operative society. The dismissed Principal of the College filed a suit for reinstatement, inter alia, contending that the management of the college through a society registered under the Co-operative Societies Act was a statutory body since affiliated to the Agra University (and subsequently to Meerut University). It was contended that the Principal's termination was in violation of statutory obligation of the society, and therefore, his reinstatement should be ordered. But that contention was not accepted and the court said : (SCC p. 74, para 28)

> "(1) That the plaintiff/respondent served the institution for a short period of two years only, i.e. from 1964 to 1966 and thereafter he was bereft of all his powers and did not work in the college for a single day.
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> (2) That if the declaration sought for or the injunction is granted to the plaintiff/respondent the result would be that he would have to be paid his full salary with interest and provident fund for full nine years, i.e. from 1966 to 1975, even though he had not worked in the institution for a single day during this period.
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> (3) That consequent upon the declaration the appellant would have to pay a very huge amount running into a lakh of rupees or perhaps more as a result of which the appellant and the institution would perhaps be completely wiped out and this would undoubtedly work serious injustice to the appellant because it is likely to destroy its very existence.
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> (4) It is true that the plaintiff/respondent is not at fault, but the stark realities, hard facts and extreme hardship of the case speak of themselves."

23. And said : (SCC pp. 74-75, para 28)

> "(5) It appears that by virtue of the interlocutory orders passed by this Court, the appellant has already deposited Rs. 9000 before the High Court which was to be

> withdrawn by the respondent after giving security, and a further sum of Rs. 9000 being the salary of 13 months has also been deposited by the appellant before the trial court under the orders of this Court. It is also stated by counsel for the appellant that the appellant has deposited Rs. 3000 more. We feel that in the circumstances the respondent may be permitted to keep these amounts with him and he will not be required to refund the same to the appellant. The amount of deposit in the High Court, if not withdrawn by the respondent may now be withdrawn by him without any security and if he has already withdrawn the amount he will be discharged from the security. This will vindicate the stand of the respondent and compensate him for any hardship that may have been caused to him by the order terminating his service, and will also put a stamp of finality to any further litigation between the parties."

24. The case of Smt. J. Tiwari ((1979) 4 SCC 160 : 1979 SCC (L&S) 356) seems to be closer to the case before us. There the appellant claimed arrears of salary for six years covered by the period of suspension from 1952 till 1958. In January 1952 she filed a suit in the court of Munsif challenging her suspension which was later withdrawn by the High Court of Allahabad for trial by itself. The High Court decreed the suit holding that the order of suspension was not made by a properly constituted committee. On May 24, 1958, her services were terminated by the management of the college with retrospective effect from the date of suspension. On August 28, 1958, she filed a suit for a declaration that she continued in the service and for setting aside the termination order. She claimed a decree in a sum of Rs. 37,657.40 by way of salary. The trial court upheld her contention that the termination of service was bad and ineffective. The trial court, however, passed a decree in her favour in the sum of Rs. 15,250 as arrears of pay for a period of three years from August 1, 1955 to July 31, 1958. Both the parties filed appeals before the High Court. The Division Bench of the High Court party allowed the appeal of the management and dismissed the appeal of Smt. J. Tiwari. The High Court took the view that though the dismissal was wrongful, she was entitled to a decree of damages only and not to a declaration that she still continued to be in the service of the management. The High Court upheld the money decree passed by the trial court, but did so on the ground that the amount awarded by the trial court by way of arrears of salary could justifiably be granted to her by way of damages. This Court while affirming the decree of the High Court has, however, said as follows : (SCC pp. 162-63, paras 7 and 8)

> "The High Court has treated the claim for three years' arrears of salary as being payable to the appellant on account of damages. But that is not a right approach to the problem. The appellant is entitled to three years' arrears of salary for the period of suspension since the order of suspension was without jurisdiction and until May 1958 no order of termination of her service was passed by the Society. In addition to the arrears of three years' salary, the appellant would be entitled to three months' salary as provided for by clause 10 of the agreement.
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> We would like to add that even if the appellant could be held to be entitled to a declaration that she continued to be in service of respondent 1, this is not a proper case in which such a declaration should be granted to her. The appellant's claim according to her counsel would amount to over Rs. 2 lakhs. The appellant has admitted in her evidence that she did not make any attempt to mitigate the damages by trying to obtain an alternative employment during the last 20 years. The difficulty of obtaining employment is an argument which cannot be permitted to a person who, on her own showing, has made no effort to obtain any employment."

25. Deepak Kumar Biswas case ((1987) 2 SCC 252) appears to be the closest to the present case. There the appellant was a Lecturer in English in Lady Keane Girls College, Shillong. The college was governed by the statutes of the Meghalaya University and the Education Code framed by the State Government. The college was also receiving financial aid from the government. His appointment was terminated for want of approval by the Director of Public Instruction. The trial court decreed the suit for declaration and permanent injunction. The appellate court set aside that decree and granted monetary compensation of one year salary as damages although his removal was found to be wrongful. This Court sustained the removal but enhanced the compensation to three years' salary following the pattern adopted in the aforesaid two cases.

26. What do we have here ? In 1962 the respondent was appointed as a Chemistry lecturer in the scale of Rs. 175-10-215. His performance was found to be unsatisfactory. In August 1964, he was placed under suspension. In January 1966, he was again suspended. Thereafter, he brought suit after suit, appeal after appeal from the lowest court to the apex court. He continued the litigation for about 25 years. On March 17, 1975 the management had appointed Dr. Gopendra Kumar as Chemistry lecturer and his appointment was approved by the DIOS. On October 28, 1982 the management passed a resolution confirming his appointment w.e.f. September 27, 1975. That was also approved by the DIOS. Dr. Gopendra Kumar was not a party to any one of the earlier litigations nor to the present appeal.

27. The respondent knew very well that his service contract was with the private management. In 1964 itself learned Munsif while dismissing the first Suit No. 422 of 1963 has held that his contract of employment could not specifically be enforced. He was then obliged to place his services on the market to mitigate the damages. But he did nothing of the kind. In 1968 he joined legal profession and he is still not out of it. He has not disclosed his professional income. In fairness he ought to have disclosed his income to the court since it is in his personal knowledge. Instead, he seems to have urged before the High Court that the professional income is not relevant for consideration. The High Court while accepting the submission went a step further and observed : "that joining the legal fraternity can never be said to be employment and could not disentitle the respondent to claim his arrears of salary". Legal profession may not be considered as an employment but the income from profession or avocation if not negligible, cannot be ignored while determining damages or backs wages for payment. It must also be taken into consideration. In S. M. Saiyad v. Baroda Municipal Corporation, Baroda (1984 Supp SCC 378 : 1985 SCC (L&S) 16) the court gave deduction of even a small income of Rs. 150 per month earned by the worker turned advocate while awarding back wages upon reinstatement.

28. But we cannot accept the contention for the appellants that the sum of Rs. 10,000 decreed in favour of the respondent in Civil Appeal No. 5891 of 1983 was a final settlement of all his claims. There is no indication in the order of this Court to that effect.

29. In the light of all these facts and circumstances and the authorities to which we have called attention, it seems to us that it would be sufficient if the respondent is given salary for three years on account of damages.

30. In the result, the appeals are allowed and in reversal of the judgment of the High Court, we direct that the respondent be paid three years salary. The payment shall be treated as a final settlement of all his claims. The payment shall be made by the management and not by government. In a case like this, the government cannot be saddled with the liability to make payment. There is no relationship of master and servant between government and respondent and such relationship existed

only between the management and respondent. So far as statutory liability to pay salary to teachers is concerned, the government has been paying salary to Dr. Gopendra Kumar who has since been appointed as lecturer in the place of respondent. Therefore, the management alone should pay the amount ordered. The payment shall be made within four weeks.

31. In the circumstances of the case, we make no order as to costs.

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