

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2015

CORAM:

THE HONOURABLE MR.JUSTICE V.DHANAPALAN
AND
THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

W.A.No.2105 of 2011
& M.P.No.1 of 2011

The Tamil Nadu Civil Supplies Corporation,
No.12, Thambusamy Road,
Kilpauk, Chennai-600 010,
Rep. by its Chairman-cum-Managing Director.

... Appellant

Vs.

1. The Assistant Commissioner of Labour,
DMS Compound, Teynamept,
Chennai-600 006.
2. The Joint Commissioner of Labour
(Competent Appellate Authority under the
Payment of Gratuity Act, 1972),
Labour Welfare Building,
6th Floor, Teynempet, Chennai-600 006.
3. K.Natarajan

... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent against
the order dated 25.07.2011 made in W.P.No.3377 of 2007 on the file of
this Court.

Writ Petition praying to Writ of Certiorarified Mandamus, calling for
the records of the third respondent ending with his order in case
No.P.G.A.2 of 2006 dated 10.8.2006 and quash the same and direct the
first respondent to pay the gratuity of Rs.31,154/- as computed by
the second respondent together with interest.

For appellant : Mr.Ravi for M/s.Gupta and Ravi
For respondents : Mr.R.Rajeswaran, Spl.G.P. for RR-1 & 2
Mr.S.D.S.Philip for R-3

JUDGMENT

(The Judgment of the Court was delivered by V.Dhanapalan,J)

Heard Mr.Ravi, learned counsel appearing for the appellant/Tamil Nadu Civil Supplies Corporation (TNCSC), Mr.S.Rajeswaran, learned Special Government Pleader appearing for the respondents 1 and 2 and Mr.S.D.S.Philip, learned counsel appearing for the third respondent.

2. The challenge in the Writ Appeal by the TNCSC is to the order of the learned single Judge in W.P.No.3377 of 2007, dated 25.07.2011, in which, the third respondent/writ petitioner called in question the order of the second respondent herein (Joint Commissioner of Labour), who is the competent appellate authority under the Payment of Gratuity Act, 1972, passed in P.G.A.2 of 2006, dated 10.08.2006, seeking to quash the same and to direct the appellant-TNCSC to pay the gratuity of Rs.31,154/- as computed by the first respondent-Assistant Commissioner of Labour, together with interest. The learned single Judge, on going through the material facts as well as the legal position, came to the conclusion that the third respondent/writ petitioner is entitled to have the benefits of the said Act and thereby, allowed the Writ Petition, set aside the impugned order, dated 10.08.2006 and directed the appellant/TNCSC to implement the order of the first respondent/Controlling Authority, dated 29.11.2005 within a period of four weeks from the date of receipt of a copy of the order.

3. The case focussed by the third respondent/writ petitioner before the Writ Court is that he was initially employed as a casual labourer in the appellant/TNCSC, which is fully owned by the Government of Tamil Nadu, in the year 1972 and was absorbed in the year 1998 as a regular employee; he retired from service on 30.6.2001, after putting in 29 years of total service. The appellant/TNCSC absorbed him as a regular employee, vide order dated 02.01.1998 passed by the Government of Tamil Nadu, wherein, the Government directed the appellant/TNCSC to make permanent such of those casual labourers who had completed ten years of service. Therefore, the third respondent/writ petitioner/employee claimed that he had put in required number of years of service to be regarded as a permanent employee and also eligible for calculating the gratuity. He retired on 30.06.2001, without payment of gratuity, on the ground that he had served only two years of permanent service. Since the claim was denied by the appellant/TNCSC, he moved the first respondent-Controlling Authority (Assistant Commissioner of Labour) with an application under Section 7(1) of the Payment of Gratuity Act, 1972 (for short, 'the Act'). The said application was contested

by the appellant/TNCSC on the ground that there was a delay in filing the application and also that he was appointed as permanent employee only in 1999 as a labourer and had not completed five years of service to claim gratuity, among other grounds. The Controlling Authority, after looking into the facts and appreciating the materials available before him, passed an order on 29.11.2005 holding that the writ petitioner was already functioning as a casual labourer even prior to 1999 and he was made permanent in the year 1998 and continued in employment thereafter and as the writ petitioner was functioning for more than ten years prior to regular appointment/permanent appointment, he was entitled to get gratuity amount as he was having total service of 12 years and accordingly, the Controlling Authority calculated the gratuity payable to him at Rs.31,154/- on the ground that his daily wage was Rs.150/- per day and he had served for more than 12 years. Aggrieved by the said order of the Controlling Authority, the appellant/TNCSC filed appeal before the second respondent/competent appellate authority (Joint Commissioner of Labour) in P.G.A.2/2006, which was allowed by order dated 10.08.2006, against which, the Writ Petition was preferred by the employee before the learned single Judge.

4. It was claimed before the learned single Judge that the third respondent/writ petitioner had served for a total number of 29 years from 1972 to 30.06.2001 till his retirement and hence, according to the learned counsel for the writ petitioner, he is entitled to get the benefit of gratuity in terms of Section 7(2) of the Act, as he is coming within the meaning of "employee" under Section 2(e) of the Act. It was also contended before the learned single Judge that the Controlling Authority, on proper appreciation of the facts and law, allowed the third respondent-employee's claim by the said order dated 29.11.2005 and ordered payment of gratuity Rs.31,154/-, by calculating the same as per his daily wage at Rs.150/- per day and that he had served for more than 12 years and as the same was not paid, 10% per annum from the date of disbursement till the date of payment, was ordered and it was further submitted that the order of the Controlling Authority has been set aside by the appellate authority without looking into the material facts and the legal position and without taking into account the third respondent/employee's daily rate pay and service for several years and therefore, the factually incorrect information had been taken into account by the appellate authority and the appeal was allowed by setting aside the order of the Controlling Authority. Therefore, the learned counsel for the third respondent/writ petitioner prayed before the Writ Court for allowing the Writ Petition and restoring the order of the Controlling Authority.

5. The appellant/TNCSC contended before the learned single Judge that the third respondent-writ petitioner-employee has not rendered five years of service in the TNCSC and his direct employment was from 30.04.1999 to 30.06.2001, i.e. for a period of two years and two months and even though he was absorbed in the TNCSC, he was previously employed not directly in the TNCSC and hence, the order of the appellate authority is just and proper.

6. After looking into the said rival claims made by the respective parties and on a perusal of the order of the Government issued in Letter No.Ms.No.2, Co-operative, Food and Consumer Protection Department, dated 02.01.1998, it was found by the learned single Judge that the Government ordered regularisation of the services of the persons serving as Loadmen in the TNCSC for ten years and the said Government Letter was issued to implement the policy announced by the Chief Minister of Tamil Nadu on the May Day celebrations held on 01.05.1997 and the third respondent-writ petitioner having completed ten years of service in the TNCSC godown as Loadman, was admittedly regularised from 30.04.1999 and he retired on attaining the age of superannuation on 30.06.2001. The learned single Judge considered the legal position under Section 2(e) of the Act and applying Section 7(2) of the Act, which mandated payment of gratuity for a person who served for a period of five years and the writ petitioner, having served for more than 12 years as per the factual findings rendered by the Controlling Authority and that the finding of facts have not been dealt with by the appellate authority who held that the writ petitioner has initially served on contract basis and therefore, he cannot be given gratuity, the learned single Judge, however took a view that the Government, while ordering regularisation, absorbed him in the TNCSC and such of those persons who have completed ten years of service though under the contractor, Section 2(e) of the Act makes no distinction of employment on daily wages basis and employment through the contractor and the Legislature had not made any distinction between daily rated workmen and permanent workmen and that being the intention, the definition would have been in different and positive terms. The learned single Judge, applying the ratio laid down by the Supreme Court in Silver Jubilee Tailoring House and others Vs. Chief Inspector of Shops and Establishment and another, reported in 1974 (3) SCC 498, in Shri Birdichand Sharma Vs. First Civil Judge, Nagpur and others, reported in 1961 (3) SCR 161, in Divisional Manager, New India Assurance Company Limited Vs. A.Sankaralingam, reported in 2008 (10) SCC 698, in the case of Harjinder Singh Vs. Punjab State Warehousing Corporation, reported in 2010 (3) SCC 192 = AIR 2010 SC 1116, a decision of a Division Bench of this Court in the case of Jeevanlal Limited Vs. Controlling Authority under the Payment of Gratuity Act,

reported in 1982 (1) LLJ 86, a decision of the Himachal Pradesh High Court reported in 2008 (2) LLJ 8 in the case of H.P.S.E.B. Vs. Balak Ram, in which, the decision of a Full Bench of the Punjab and Haryana High Court reported in AIR 1988 P & H 265, in the case of Kesar Chand Vs. State of Punjab, was followed and also applied the principles of the Supreme Court in the decisions reported in AIR 2003 SC 1526 = 2003 (3) SCC 40 = 2003 (1) LLJ 1119 (H.Gangahanume Gowde Vs. Karnataka Agro Industries Corporation Limited) and 1994 (1) LLN 573 (Chander Sain Vs. State of Haryana), held that the appellate authority is not justified in denying the gratuity to the writ petitioner on the ground that he became permanent workman only in the year 1999 and the Government having passed the order to make the persons permanent, who have completed ten years of service on daily wages, the benefit shall be given in full, failing which, it will have an effect of not extending the full benefit by the appellant-TNCSC and therefore, the order of the Controlling Authority is just and proper and that of the appellate authority is liable to be set aside and thereby, the learned single Judge allowed the Writ Petition with further direction as stated supra.

7. Mr.Ravi, learned counsel for the appellant/TNCSC strenuously contended that the employee who had been under a contractor as Loadman prior to his absorption in the service, could not be taken into account as permanent employee, as the minimum service to be rendered for paying gratuity is five years as per the requirement of Section 4 of the Act and therefore, the appellate authority is right in deciding the case in favour of the TNCSC and however, the Controlling Authority as well as the learned single Judge have taken contrary view, which is against the law and therefore, the impugned order of the learned single Judge is legally infirmed as to the findings of fact. He further contended that as per Section 2(e) of the Act, the payment of gratuity is for the permanent employees of any organisation and the definition of "employee" will have to be interpreted in the manner as the Legislature intended and the gratuity should be paid in respect of only the eligible and deserving employees. Referring to various provisions of the Act as well as the Payment of Wages Act, he contended that the actual principles enunciated therein have to be applied to the facts of the present case and that a contract employee could not be the person to be construed as an employee under the TNCSC and it is for the contractor to determine as to what would be the wages to be paid and the appellant-TNCSC has got only limited control over them, i.e. only supervisory control, and therefore, the learned single Judge is not right in allowing the Writ Petition. In support of his submissions, learned counsel appearing for the appellant/TNCSC relied on a decision of the Kerala High Court reported in 1989 (1) LLJ 452

(Kerala) (Cominco Binanai Zinc. Ltd. Vs. Pappachan), wherein, it was observed as follows:

"6. Even in a case where the canteen is run by the contractor the management of the factory like the petitioner cannot absolve themselves from the liability to pay the wages to the workers engaged in the canteen. The principal-employer's liability to pay wages is recognised in S.21(4) of the Contract Labour (Regulation and Abolition) Act, 1970 as well. If the contractor fails to pay the wages the petitioner will be bound to pay the same. The wages due to the workmen does not include bonus or gratuity. This is made clear by the definition of wages in the Industrial Disputes Act and Payment of Wages Act. While defining the term "wages", the above mentioned Acts specifically excludes bonus and gratuity from its purview. So, on the facts of this case the petitioner is liable to pay the wages due to the workers which is in arrears and nothing more."

"9. The Tribunal while dealing with the issue relating to gratuity took the view that workers in the canteen are directly employed by the petitioner, that they are integral part of the factory and on that account they are entitled to gratuity from the petitioner. This finding is also against the provisions of law. As stated earlier, the workers in the canteen are not the employees of the petitioner and so they are not entitled to claim gratuity from the petitioner."

8. Controverting the above submissions, learned counsel for the third respondent/writ petitioner contended that the Act being a welfare legislation, has to be interpreted in the manner as contemplated therein and to be applied to the facts of the case, by taking into account the total service rendered by the writ petitioner-employee and what is the required number of years of service as contemplated both under the relevant Acts and Rules, should be taken into consideration, which should also be in consonance with the policy of the Government in regularising the services of those who have been employed as Loadmen and the policy having been announced by the Chief Minister on the gesture of May Day celebrations, it would not be interpreted in the manner as to deny the benefits to him without taking into account the total number of years of service for giving the benefit of the scheme announced. Referring to various provisions of the Act and also the Rules position, he contended that the writ petitioner has put in 29 years of service from 1972 to 30.06.2001 and under Section 7(2) of the Act, he has to be paid the gratuity, as he is coming within the definition

of "employee" under Section 2(e) of the Act and therefore, there cannot be denial of the gratuity to be paid to him as contemplated under the law and the Controlling Authority as well as the learned single Judge have rightly decided the issues and questions and there is no scope for interference by this Court in this Writ Appeal. In support of his submissions, the learned counsel for the third respondent relied on the following decisions:

(i) 1984 (3) SCC 518 = AIR 1984 SC 1388 (Katheerja Bi Vs. Superintending Engineer):

"8. There was then the usual lament that a large number of employees were involved and, therefore, the cost will be heavy. We do not understand this argument at all. Does it mean that beneficent legislations and beneficent schemes must be confined to small establishments employing a few workers only? On the other hand, it is misleading to say that the cost is heavy. The cost is made to appear heavy divorced from the size of the establishment. If the establishment is huge and if a large number of workmen are employed the total wage-bill may appear to be heavy, but is it really so? Is it disproportionate to the size of the establishment, its resources, its revenues and its other expenditure? Is the individual wage-bill also very high? To talk of heavy cost without reference to other circumstances is to present an entirely unfaithful picture. We need make no further comment."

(ii) 2007 (8) SCC 501 = AIR 2007 SC 2946 (M.C.Chamaraju Vs. Hind Nippon Rural Industrial (P) Ltd:

"15. In our considered opinion, the Division Bench ought not to have undertaken the above exercise which had been done by the Controlling Authority as also by the Appellate Authority. The High Court was exercising power of 'judicial review' which, in its inherent nature, has limitations. This is particularly true since the learned Single Judge also did not think it fit to interfere. We are, therefore, of the view that the Division Bench was wrong in setting aside all the orders and in allowing the appeal of the Management and in dismissing the application filed by the workman.

16. There is another aspect also which is relevant. The Act has been enacted with a view to grant benefit to workers, a 'weaker section' in industrial adjudicatory process. In interpreting the provisions of such beneficial legislation, therefore, liberal view should be taken. A benefit has been extended by the Authorities under the Act to the workman by recording a finding that the applicant

(appellant herein) had completed requisite service of five years to be eligible to get gratuity. In that case, even if another view was possible, the Division Bench should not have set aside the findings recorded by the Authorities under the Act and confirmed by a Single Judge by allowing the appeal of the employer.

17. Finally, we are of the view that on the facts and in the circumstances of the case also, the Division Bench was not justified in setting aside the orders passed by the Authorities and confirmed by the learned Single Judge considering comparatively a small amount involved in the appeal. As already noted in the earlier part of the judgment, the appellant was held entitled to Rs.16,785/- along with interest @ 10% p.a. To us, therefore, even on that ground, the Division Bench should have refrained from quashing the orders."

(iii) 1990 (4) SCC 744 (Bank of India Vs. T.S.Kelawala):

"23. It is not enough the employees attend the place of work. They must put in the work allotted to them. It is for the work and not for their mere attendance that the wages/salaries are paid. For the same reason, if the employees put in the allotted work but do not, for some reason -- may be even as a protest -- comply with the formalities such as signing the attendance register, no deduction can be effected from their wages. When there is a dispute as to whether the employees attended the place of work or put in the allotted work or not, and if they have not, the reasons therefor etc. the dispute has to be investigated by holding an inquiry into the matter. In such cases, no deduction from the wages can be made without establishing the omission and/or commission on the part of the employees concerned."

(iv) MANU/TN/7635/2006 (The Management of Cruickshank and Company Ltd. Vs. The Appellate Authority under Payment of Gratuity Act):

"14.1. In the light of the above provisions, we proceed to decide the above two issues, viz., whether the entitlement of contract labourers for gratuity can be dislodged or denied on account of tussle between the principal employer, who engaged the service of the contract labourers and the contractor, who employed the contract labourers and when the claimants are engaged under contract

labour system, to what extent the principal employer is liable to pay the gratuity.

14.2. In this regard, it is relevant to refer Section 21(4) of the Contract Labour Act, which reads as follows:-

"21. Responsibility for payment of wages. -(1)

(2)

(3)

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. "

"14.3. Since the appellate authority had already rendered a finding that the petitioner alone is the principal employer in view of Section 21(4) of the Contract Labour Act, even though the third respondent, contractor, fails to make the payment of wages, the principal employer is liable to pay the wages in full or the unpaid balance due as the case may be, to the claimants employed by the third respondent, contractor and recover the amount so paid from the third respondent, contractor, either by deduction from any amount payable to the third respondent, contractor under any contract or as a debt payable by the third respondent, contractor.

14.4. The next question that arises for consideration is whether the wages liable to be paid by the principal employer includes gratuity. To decide the above question, we are constrained to refer the definition of wages as defined under Section 2(1)(h) of the Contract Labour Act, 1970. As per Section 2

(1)(h) of the Contract Labour Act, 1970, the wages shall have the same meaning as to Section 2(vi) of the Payment of Wages Act, 1936. It is a settled rule of interpretation that incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it'. The effect of incorporation is

admirably stated by Lord Esher, M.R: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it. Even though only particular sections of an earlier Act are incorporated into the later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by Lord Blackburn: 'When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act, vide Justice G.P.Singh, in his Principles of Statutory Interpretation.

14.5. In this connection, it is apt to refer Section 2 (vi) of the Payment of Wages Act, 1936, which reads as follows:-

"2 (vi) - "wages" means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes --

(a) any remuneration payable under any award or settlement between the parties or order of a Court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination or employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force, but does not include --

(1) any bonus (whether under a scheme of profit-sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;

(2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government;

(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(4) any travelling allowance or the value of any travelling concession;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; and

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

14.5. The meaning for the word 'wages' as defined in Section 2(1)(h) of the Contract Labour Act, 1970, is traceable to Section 2(vi) of the Payment of Wages Act, 1936. Consequently, to decide whether the wages liable to be paid to the contract labourers, the claimants herein, under the provisions of the Contract Labour Act, 1970, includes gratuity, a harmonious reading of Section 2(vi)(d) and sub-clause (6) of Section 2(vi) of the Payment of Wages Act, 1936, is inevitable. Of course, an argument is possible by superficial reading and narrow interpretation of clause (6) of Section 2(vi) of the Payment of Wages Act to contend that the wages do not include gratuity. A combined reading of Section 2(vi)(d) and sub-clause (6) of Section 2(vi) results in a legal/statutory fiction, which compels the Court to believe something to exist which in reality does not exist. A legal/statutory fiction is nothing but the presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such legal/statutory fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances, vide *Gajraj Singh & Ors. V. State Transport Appellate Tribunal* [(1997) 1 SCC 650]. It is a well-known principle of construction that in interpreting a provision creating a legal fiction, the Court has to ascertain for

what purpose the fiction is created and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to give effect to the fiction, vide *State of Maharashtra v. Laljit Rajshi Sha & Ors.* [(2000) 2 SCC 699]. But, on a conjoint reading of Section 2(vi)(d) and sub-clause (6) of Section 2(vi) and by virtue of legal/statutory fiction created in sub-clause (6) of Section 2(vi) exempting the benefits conferred under clause(d) within the purview of gratuity that is excluded from the meaning of wages under sub-clause (6) and the gratuity claimed by the claimants herein being a welfare benefit created and payable by operation of law under the provisions of the Payment of Gratuity Act which are included under clause(d) of Section 2(vi) of the Payment of Wages Act within the meaning of wages payable to the contract labourers, it would be the basic responsibility of the petitioner to make payment of gratuity to the claimants in full or in part as per Section 21(4) of the Contract Labour Act, of course, without prejudice to the right of the petitioner to recover the same from the third respondent, contractor, even though the initial responsibility to make such payment of gratuity lies with the third respondent, contractor, as the welfare legislations such as

- (i) Payment of Wages Act, 1936;
- (ii) Contract Labour (Regulation and Abolition) Act, 1970; and
- (iii) Payment of Gratuity Act, 1972, are to be interpreted liberally and in widest possible construction in favour of the labourers, the claimants herein. Therefore, for deciding whether the wages payable to the claimants includes gratuity within the meaning of Contract Labour Act, 1970, whereunder the definition of wages is traceable to the definition of wages in the Payment of Wages Act, 1936 and the centrifugal issue whether the gratuity payable under the Payment of Gratuity Act is protected under Section 2(vi)(d) of the Payment of Wages Act, 1936, in spite of exclusion under sub-clause (6) of Section 2(vi) of the Payment of Wages Act, 1936, we are constrained, as a rule of interpretation, to refer the object and reasons of the legislative intention of all the three statutes, referred to above and the scope and ambit of the provisions contained thereunder and are satisfied that the gratuity being a benefit created and payable by operation of law under the provisions of the Payment of Gratuity Act, 1972, is protected within the definition of

wages for having included under clause (d) of Section 2(vi) of the Payment of Wages Act, 1936. Therefore, the Court has to give full effect to the legal/statutory fiction and such fiction has to be carried to its logical conclusions, as any other view would only frustrate the legislative intention of all the enactments."

9. We have also heard the learned Special Government Pleader appearing for the respondents 1 and 2 on the above aspects.

10. We have heard the learned counsel appearing for the parties and perused the material documents available on record.

11. It is seen that the third respondent-employee was a casual labourer in the appellant-TNCSC from 1972 and he was absorbed in 1998 as a regular employee and he retired from service on 30.6.2001. The appellant-TNCSC took a stand by contesting the matter by filing counter affidavit before the Writ Court that the TNCSC is an undertaking fully owned by the Government of Tamil Nadu and the aim of the TNCSC is to distribute essential commodities to the consuming public at subsidised rates fixed by the Government of Tamil Nadu through Co-operatives and retail shops run by the TNCSC and for the said purpose, the TNCSC is having godowns in Taluks and essential commodities like rice, wheat, etc., are being received from the Food Corporation of India or from other sources and are stored in the godowns and then moved to the ration shops as and when required. In order to handle the essential commodities in the godowns, the handling works are entrusted to Maistries, who engage their Loadmen in the godowns and distribute the handling charges to the Loadmen engaged by them. This practice was in vogue before 1999. On 01.05.1997, the Chief Minister of Tamil Nadu announced that the Loadmen working in the appellant-TNCSC will be entrusted work directly and wages will be paid to them. Accordingly, the Loadmen working under the Maistries were identified in the year 1998 and were given direct entrustment of work from April 1999 onwards by issuing separate order to each Loadman and the wages are paid to them directly and certain benefits were also extended to them. The third respondent-employee who was working under a Maistry in Sirukaveripakkam in Kancheepuram Region, was allowed to work continuously under the TNCSC from 30.04.1999 by the Regional Manager, Kancheepuram, by proceedings in No.E1/3196/97, dated 30.04.1999 and it was clearly stated therein that on the day when he will be attaining the age of superannuation, he will be relieved from the work of loading and unloading activities. An employee is entitled to gratuity only after rendering not less than five years of service

with the employer and therefore, it is the contention of the learned counsel for the appellant-TNCSC that the employee's direct employment was only from 30.4.1999 to 30.06.2001, i.e. for a period of two years and two months and even though he was absorbed in the TNCSC, he was previously employed not directly in the TNCSC and therefore, the impugned order of the appellate authority is just and proper.

12. To examine the position as to the payment of gratuity to the third respondent-employee, it is relevant to note that Section 2(e) of the Act provides that "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oil-field, plantation, port, railway company, shop or other establishment, to which the Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. The term "wages" has been defined in Section 2(s) of the Act, which states that "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance, but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance. Section 4 of the Act deals with the payment of gratuity and Section 4(1) contemplates that the gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years--(a) on his superannuation; or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease, provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement. Further, the claim was made by the writ petitioner under Section 7 of the Act, which relates to the determination of the amount of gratuity and Section 7 (1) of the Act states that a person who is eligible for payment of gratuity under the Act or any person authorised, in writing, to act on his behalf, shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity and Section 7(2) of the Act states that as soon as gratuity becomes payable, the employer, shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

13. Further, under Section 2(vi) of the Payment of Wages Act, 1936, "wages" means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes--(a) any remuneration payable under any award or settlement between the parties or order of a Court; (b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period; (c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name); (d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made; (e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force, but the "wages" does not include--(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court; (2) the value of any house accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government; (3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon; (4) any travelling allowance or the value of any travelling concession; (5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or (6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

14. From a reading of the above provisions of the Payment of Gratuity Act and the Payment of Wages Act, it is clear that "employee" and the "wages" to be paid to him, have been clearly defined therein. If an employee of the concerned TNCSC works on contract basis, it would clearly mean that he is a person other than an apprentice who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise. But the said Section 2(e) of the Act has not distinguished any nature of the work whether daily wages or contract labour or otherwise. Due to the perennial nature of employment of the third respondent-employee as Loadman for more than ten years, he was made permanent as per the Government Order which was passed based on the announcement of the Chief Minister on the May Day celebrations, which

is the policy/scheme of the Government and he has been absorbed based on that policy and when that being the position, it is not as if the third respondent has been engaged or employed as Loadman from the date of announcement of the policy and it would mean that he has already been in employment as daily wages or in any nature of employment, and he was to be given absorption and accordingly, the Government's policy has been given effect to and he has been made permanent employee from 30.04.1999. Further, the word "wages" under the Payment of Gratuity Act has been defined to mean all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance, but does include any bonus, commission, house rent allowance, overtime wages and any other allowance. When that being the position, an employee's terms and conditions of his service, are the governing principles in making him eligible for the benefits of the scheme of the Government and in this case, the order of the Controlling Authority under the Payment of Gratuity Act, as annexed in the typed set of papers filed along with the Writ Appeal, reveals that the applicant-employee (third respondent herein) who is an employee of the TNCSC is entitled to payment of gratuity under Section 4 of the Act on account of his retirement on 30.06.2001 after completion of five years of continuous service and the application made by the employer in that regard was properly considered. The particulars annexed therein also reveal that he worked as Loadman with Identification No.R.03/Go14/07 (Green Card Holder) from 1972 and retired on 30.06.2001 on attaining the age of superannuation. He claimed that wages have been paid at Rs.150/- per day and the total period of service rendered by him was shown as 29 years. These are all factors which have been taken into account by the competent authority on 30.04.1999, who granted permission to the third respondent-employee Mr.K.Natarajan, who was aged 55 years at that time, showing his date of birth as 01.07.1943, who has confirmed to the qualifications and worked under the godown Maistry, Kancheepuram Zone, to continue to work in the godown from the date of issuance of the order of permanency under the terms and conditions, stating that the daily wages to the aforesaid Loadman would be disbursed by the godown in-charge; the aforesaid Loadman on attaining the age of 58 will be retiring from service due to superannuation (date of superannuation 30.06.2001), that in the event of the Loadman not able to perform his duty of loading and unloading, the establishment has got the right to either give one month's notice or pay one month's wages in lieu thereof and relieve him from service; the aforesaid Loadman would be paid Rs.10.37 per tonne for loading and unloading and Rs.11.18 per tonne for stacking; the aforesaid Loadman is not entitled to any bonus as per the Bonus Act, however, ex-gratia amount

could be paid on humanitarian consideration and this should not be claimed as a matter of right; that the Loadman is entitled to avail the benefits under the Payment of Gratuity Act, 1972 and Employees' Provident Fund Act, 1952; that the Loadman is entitled to any medical benefits, however First Aid facility would be provided, apart from other terms and conditions stated therein. Accordingly, the Senior Zonal Manager, Kancheepuram of the TNCSC passed an order on 29.06.2001 making it clear that as per the directions of the Head Office, orders had been issued for the Loadmen who have completed continuous service of ten years to work on the rolls of the godowns and as per the Medical Certificate submitted by the third respondent-Natarajan, he attained the age of 58 and the order is being issued that he was relieved from the services on 30.06.2001.

15. From a reading of the above order, it is clear that the persons on the rolls of the godowns and worked under the Maistries and having rendered ten years of service, were to be absorbed and accordingly, the absorption of the third respondent-employee was made in the appellant-TNCSC.

16. A paramount question was raised by the learned counsel for the appellant-TNCSC by stating that the godown Maistry is not in the hierarchy of the position in the administrative side and the godown Maistry is a person having control over the Loadmen for the purpose of loading and unloading of the stock coming to the godown and therefore, the services rendered by the third respondent under the godown Maistry could not be taken into account for counting the ten years of minimum service for absorption in the TNCSC as required under the Act for making payment of gratuity and the third respondent having come under the direct employment from 30.04.1999 and retired from service on 30.06.2001, has only rendered two years two months service and therefore, the requirement under Section 4 of the Act for a minimum of five years, is not satisfied, and therefore, the benefit of payment of gratuity under Section 7(2) of the Act cannot be extended to him and if such a course is adopted, those who are all working under the contractors may raise an alarm claiming the extension of benefits under the Payment of Gratuity Act. It may be the reason that the impact of extending such benefits will have a serious concern. But in the given circumstances of the case, the policy was announced by the Chief Minister of Tamil Nadu as to the conditions of service of the Loadmen working in the TNCSC for several years and having not gained any benefits from the TNCSC, they have been absorbed in their position as such, and thus, those worked in the TNCSC having been allowed to be made permanent by absorbing them and that the policy has been given effect to by taking into account the persons who are the Loadmen in the rolls of the godown and such a

period of service rendered by the third respondent as daily wages, has to be taken into account, though under the godown Maistry, unless and otherwise in the context provided under the Act there is a convincing material element to show that the godown Maistry is a contractor and any such contract was given to such a person. The verification of the records in the present case reveals that the godown Maistry has not been shown as a contractor and when that being the position, in the absence of any material information to the peculiar facts and circumstances of this case, we are of the considered opinion that the Loadmen who had been under the godown Maistries as employees will come under the definition of "employee" under Section 2(e) of the Act, and having realised the benefits of the scheme of the Government and the policy announced by the Chief Minister on the May Day celebrations, those who are all on the rolls of godowns, having been made as permanent employee for the benefits, the view taken by the learned single Judge as to the entitlement of the payment of gratuity has to be extended to the third respondent also, is legally correct on facts and law and the concurrent view of the Controlling Authority and the learned single Judge as to the factual findings and application of the law, in our considered opinion, has to be confirmed. Accordingly, we have no hesitation to dismiss this Writ Appeal.

17. Furthermore, the Act is enacted to introduce a scheme for payment of gratuity as a measure of social security and hence, it is a social welfare legislation and it has now been universally recognised that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work due to old age, etc. Thus, the Act has been enacted to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oil-fields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto and with a view to grant benefit to workers, a 'weaker section' in industrial adjudicatory process and in interpreting the provisions of such beneficial legislation, liberal view should be taken. In this case, a benefit has been extended by the authority under the Act to the third respondent-Loadman by recording a finding that he had completed requisite numbers of years of service eligible for payment of gratuity. Gratuity in its etymological sense is a gift, especially for services rendered, or return for favours received. For the wage-earning population, security of income, when the worker becomes old or infirm, is of consequential importance and the provisions of social security measures, retiral benefits like gratuity, provident fund and pension (known as triple benefits) are of special importance. In bringing the Act on the statute book, the intention of the Legislature was not

only to achieve uniformity and reasonable degree of certainty, but also to create and bring into force a self-contained, all-embracing, complete and comprehensive code relating to gratuity and the significance of this legislation lies in the acceptance of the principle of gratuity as a compulsory and statutory retiral benefit. The expression "gratuity" itself suggests that it is a gratuitous payment given to an employee on discharge, superannuation or death and it is in addition to other retiral benefits payable to the employee. Gratuity is an amount paid unconnected with any consideration and not resting upon it, and has to be considered as something given freely, voluntarily or without any recompense. It is a sort of financial assistance given to a retiring employee to tide over the post-retiral hardships and inconveniences. Hence, a lenient view has to be taken in favour of the employees.

18. It is also to be noted that the gratuity is a reward for long and meritorious service. A terminal lump-sum benefit paid to a worker when he leaves his employment after having worked under the employer for a certain minimum number of years, is commonly called "gratuity". It is in the nature of a gift and not of a debt which would be legally recoverable by an ex-employee, so that, being a gift, it is not completed until the actual payment of the sum of money is made. It is not attachable in execution of a decree. The gratuity is thus held to be a reward or gift for good, efficient and faithful service rendered by an employee for a considerable period. "Gratuity" is a kind of retirement benefits like the provident fund or pension and is intended to be paid to workmen to help them after retirement, whether the retirement is the result of the rules of superannuation or of physical disability. Gratuity is a vested right accrued on an employee on his superannuation, which cannot be taken away at the sweet-will of the employer, without any rhyme or reason, unless the context otherwise provides for retaining the gratuity as per law. Though gratuity is not a bounty to be paid on the whims of the employer, being a creature of the statute, the entitlement depends on fulfilment of conditions prescribed under the Act. The liability to pay gratuity after the retirement of an employee, is fastened on the employer, and in this case, it is on the appellant/TNCSC. Gratuity is not in its present day concept and context, merely a gift to be paid by the employer on his own discretion, but the workmen have in course of time, acquired a right to gratuity on determination of employment. The payment of gratuity under the Act is mandatory and one of the minimum conditions of service and non-compliance of the provisions of the Act is an offence under the Act, which is liable to be tried against an employer. Even much before State/Centre enacted relevant legislations, the Trade Unions either by collective bargaining or by statutory adjudication, acquired certain benefits, gratuity being one

of them and the pension and gratuity are both retiral benefits ensuring that the workman who has spent his useful span of life in rendering service to an organisation and who never got a living wage, which would have enabled him to save for a rainy day, should not be reduced to destitution and penury in his old age. As a return of long service, the employee should be assured social security to some extent in the form of either pension, gratuity or provident fund, whichever retiral benefit is operative in the industrial establishment. It must not be forgotten that it is not a gratuitous payment, but it has to be earned by long, continuous and meritorious service by an employee and it is not a gratis, bakshis or inam made over to an employee by an employer. Payment of gratuity to the employees under the Act is a mandatory statutory obligation, which cannot be trifled with by adaptation of a method which runs counter to the statute. Gratuity is a lump-sum payment and is an efficiency device and is considered necessary for an orderly and humane elimination from industry of superannuated employees, who but for such retiring benefits, would continue in employment.

19. It is also worthwhile to notice that the Act creates the right to payment of gratuity, indicates when the right will accrue, and lays down the principles for qualification of the gratuity. The Act is a welfare measure introduced in the interest of the general public to secure social and economic justice to workmen to assist them in their old age and to ensure them a decent standard of life on their retirement. The provisions of the Act are not in the realm of charity, but a statutory right provided in favour of the employees. The sense of national consciousness is reflected in the Act, which fixes a reasonable number of years of service as the qualifying period for earning gratuity and thus, if an employee satisfies the requisite conditions stipulated under the Act, the gratuity amount becomes mandatorily payable to him by the employer on the very date the employee retires from service after attaining the age of superannuation. The Act does not violate Articles 14, 19(1)(b), 19(1)(g) and 31 of the Constitution of India. For the enforcement of its provisions, the Act provides for appointment of Controlling Authority, who is entrusted with the task of administering the provisions of the Act and the fulfilment of the rights and obligations of the parties are made his responsibility and he has been invested with amplitude of power for the full discharge of the responsibility. Any error committed by him can be corrected in appeal by the appropriate Government or an appellate authority under the Act.

20. The scheme and purpose of the Act are apparently to ensure that at the end of the adjudication, the employee gets the real

relief to which he is entitled to, as soon as his services come to an end. The purpose of the enactment of the Act is to confer extra benefits on the employees. The Act provides for a close-knit scheme providing for payment of gratuity and it is not only a complete code containing detailed provisions covering the essential provisions of a scheme for gratuity, but also lays down the principles for quantification thereof and also the conditions on which an employee may be denied therefrom. It is the basic responsibility of the employer to make the payment of gratuity and the employee has a right to recover the same from the employer as per the Act. Rules for payment of gratuity become incorporated in the Act and the employee should acquire the status of statutory conditions of service and an arbitrary denial is referable to whim, fancy or sweet will of the employer. Gratuity is payable to an employee on the termination/superannuation of his employment, after rendering required number of years of continuous service and being a statutory right on superannuation or retirement or resignation, etc., it cannot be taken away except in accordance with the provisions of the Act. The fundamental principle in allowing gratuity is that it is a retirement benefit for the long services rendered by an employee and it is a statutory right conferred on him as a provision for his old age. The statutory obligation of payment of gratuity cannot be left high and dry on the whims of the employer, irrespective of the factum of the employer being an authority within the meaning of Article 12 of the Constitution of India or not, as it is a mandate under the Act that gratuity is to be paid to the employee on his retirement.

21. Moreover, as stated above, the Controlling Authority has powers conferred on him under the Act and has jurisdiction to determine as to whether any case has been made out to deny the right of an employee to obtain the amount of gratuity in accordance with the provisions in the statute. In the present case, the Controlling Authority, on the statutory application of the third respondent-employee, has acted in accordance with the provisions of the Act and determined the quantum of gratuity to be paid to him, upon considering the facts and circumstances of the case and the appellate authority has reversed the findings of the Controlling Authority, which is not proper as per the Act, given the facts of the case. The learned single Judge has rightly restored the findings of the Controlling Authority, while setting aside the findings of the appellate authority, which in our view, does not warrant any interference.

22. One more aspect highlighted by the learned counsel for the appellant-TNCSC is with regard to Section 21(4) of the Contract Labour (Regulation and Abolition) Act, 1970 and Section 21 therein

deals with the responsibility for payment of wages and Section 21(4) states that in case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. It is therefore his submission that the responsibility for payment of wages vests with the godown Maistry as a contractor and not with the appellant-TNCSC and to substantiate the same, he relied on the decision of the Supreme Court reported in 1996 (2) LLN 1068 = 1996 (10) SCC 599 (Hindustan Steelworks Vs. Commissioner of Labour), wherein, the Supreme Court observed as follows:

"9. Therefore, the term "wages" for the purpose of S.21 of the Contract Labour (Regulation and Abolition) Act, 1970, means contractual wages which are payable under the terms of employment as between the contractor who is the employer and the contract labourers who are his employees. "Wages" would also include, inter alia, any remuneration which the contractor is required to pay under any award or settlement between the parties or under an order of the Court. By reason of S.21 of the Contract Labour (Regulation and Abolition) Act, 1970, the principal employer is required to nominate a representative to be present at the time of disbursement of wages by the contractor to the contract labour employed by him, in order to certify that the contractor has paid these wages. And similarly a duty is cast on the contractor to ensure that the disbursement of wages takes place in the presence of the authorised representative of the principal employer. The purpose of keeping the representative of the principal employer present is obviously to ensure that the contractor makes full payment of wages to each worker employed by the contractor as contract labour. These wages are the wages which the contractor has to pay to his workers in terms of the agreement of employment, or any award, settlement, etc. If the contractor does not pay these wages to his workmen engaged by him as contract labourers, then under Sub-sec. (4) of S.21 the principal employer becomes liable to make good the difference and recover this amount which the principal employer has paid to the workmen of the contractor, from the contractor. (Vide Gujarat Electricity Board, Thermal Power Station Vs. Hind Mazdoor Sabha and others - 1995 (2) LLN 59 and R.K.Panda and others Vs. Steel Authority of India and others - 1994 (2) LLN 378)."

"12. The short question that arises for determination is whether the appellant who is the principal employer is liable to pay to the contract workers any amount which constitutes the difference between the wages payable to the contract labour by the contractor and the wages paid by the appellant to its own employees doing similar work. The Division Bench seems to have relied upon Section 21(4) of the said Act for this purpose. Section 21(1), however, provides that the contractor shall be responsible for the payment of wages to each worker employed by him. Section 21(4) provides that if the contractor fails to make this payment or any part thereof, the principal employer is liable to make this payment and may recover the same from the contractor as set out in that sub-section. Looking to the definition of wages under the said Act read with the definition of wages in the Payment of Wages Act, which we have set out earlier, it is clear that Section 21 only deals with the payment of contractual wages by the contractor to each of his worker. The definition of wages would cover within its scope, inter alia, also those amounts which the contractor is liable to pay to his workers under any award, settlement or order of court as well as other amounts falling within the definition of "wages" under the Payment of Wages Act. Sub-section (2) provides for a representative of the principal employer supervising this payment. Clearly, therefore, the wages which are the subject-matter of Section 21 are specified sums which are payable in presenti by the contractor under the terms of his contract of employment with each worker as well as under any existing award, settlement or order of the court. Section 21 does not deal with, nor does it cover the obligations which are imposed upon a contractor under the provisions such as the Andhra Pradesh Contract Labour (Regulation and Abolition) Rules, 1971. Hence Section 21(4) will not apply to such obligations of the contractor which may be the subject-matter of dispute between the contractor and his workers at the time of disbursement of wages and which do not fall within the definition of "wages" under the Act."

23. It is true that if a contract labourer is a person having been employed under a contractor, then the question of consideration of any payment on the contract employment is a factor to be considered. Though it was so argued before the learned single Judge, the material information placed before us

as well as the verification of records, reveal that there was no such contract employment as far as the third respondent-employee is concerned and 12 years' period of service had been recorded in respect of the third respondent-employee and in the absence of anything to support to the said contention, we are not inclined to examine the said position, as we hold that the third respondent was a Loadman under the godown Maistry and therefore, as to this position, it is left open for the appellant-TNCSC to agitate the same in appropriate cases before appropriate forum and if they are in a position to establish that the Loadmen are entrusted under the contractors, then they must plead and prove the same before the appropriate forum in appropriate cases and in that event, this case cannot be applied as a precedent.

24. For the reasons stated above and applying the decisions of the Supreme Court relied on by the learned counsel for the third respondent-employee and also the decisions referred to by the learned single Judge, we confirm the impugned order of the learned single Judge and dismiss this Writ Appeal. The appellant-TNCSC shall implement the order of the first respondent-Controlling Authority, dated 29.11.2005, within a period of four weeks from the date of receipt of a copy of this judgment. No costs. The Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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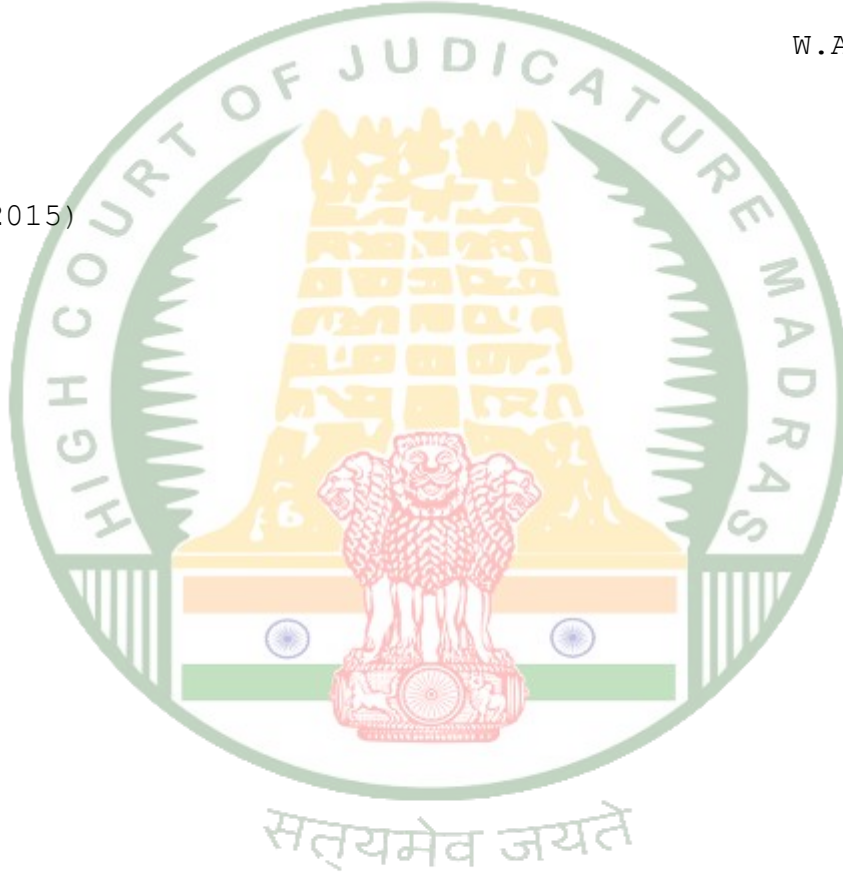
1. The Assistant Commissioner of Labour,
DMS Compound, Teynamept,
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2. The Joint Commissioner of Labour
(Competent Appellate Authority under the
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3. The Chairman and Managing Director,
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+2cc's to Mr.Philip & Priya, Advocate, S.R.No.12912
+1cc to M/s.Gupta & Ravi, Advocate, S.R.No.13026
+1cc to the Government Pleader, S.R.No.13242

W.A.No.2105 of 2011
and
M.P.No.1 of 2011

MG (CO)
CA(11/04/2015)



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