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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06 -02-2015

CORAM

THE Hon'ble Mr.JUSTICE M. DURAISWAMY

W.P.No.26937 of 2010

The General Manager,
State Bank of India,
Circle Top House,
No.16, College Road,
Chennai-600 006

.... Petitioner

vs

1. The Presiding Officer,
The Central Government Industrial
Tribunal-cum-Labour Court, Chennai

2. Sri.D.L. Sekar

.... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this court to issue a Writs of Certiorari to call for the records from the first respondent relating to I.D.No.59 of 2007 and the Award dated 17.5.2010 on the file of the Central Government Industrial Tribunal-cum-Labour Court, Chennai, the first respondent herein and quash the Award dated 17.5.2010 made in I.D.No.59 of 2007 and its proceedings.

For petitioner : Mr.V. Karthick for
M/s T.S. Gopalan & Co

For 2nd respondent: MR.Balan Haridas

R1 : Court

ORDER

Challenging the Award passed in I.D.No.59 of 2007, on the file of The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai, the Management has filed the above writ petition.

2. The brief case of the second respondent/employee is as follows:

(a) The second respondent/employee raised an Industrial Dispute, questioning the action of the petitioner/Management, in illegally terminating his service on 30.3.2005 orally, without notice, without hearing and without complying Sec.25(f) of Industrial Dispute Act.

(b) The petitioner/Management engaged the services of the second respondent, initially, as "Water Boy" and later as "Temporary Messenger". The second respondent did the work of Water Boy till 10.00 a.m and thereafter, he was doing the work of Messenger till 9.00 p.m. Initially, the second respondent was paid a sum of Rs.50/-per day as wages. The wage was paid as daily wage in the beginning and thereafter, it was paid every week and after that on monthly basis. Wage was revised to Rs.75/-per day and when the services of the second respondent was terminated, he was paid a sum of Rs.100/-per day and the same was paid on monthly basis.

(c) The second respondent had worked continuously from 1.9.2001 without any break. Though the second respondent worked from 8.10.2001 to 2.10.2002, the wages were paid to him under fictitious name "Muthu". In the petty Cash Register, against the name of Muthu, the name of the second respondent " Sekar" was also written in bracket. This was done by the petitioner/Management to evade law and to create false documents to deny the legitimate benefits to the second respondent.

(d) The second respondent had worked for more than 480 days continuously within 24 calendar months. However, his services were not made permanent in violation of Section 3 of the Tamil Nadu Industrial Establishment Confirmant of Permanent Status to Workmen Act, 1981.

(e) After engaging the services of the second respondent for nearly four years, the petitioner/Management terminated him from service on 30.3.2005 without assigning any reasons. The second respondent had worked for more than 240 days within a period of 12 calendar months immediately prior to the termination. The petitioner Bank did not give one month notice or notice pay and compensation. The termination of services of the second respondent would amount to retrenchment. The provisions of Sec.25-F of the Industrial Disputes Act, 1947 was not followed, therefore, the termination is void-ab-initio. In spite of repeated request made to the petitioner Bank, the petitioner Bank declined to provide employment to the second respondent.

(f) Though it was contended by the Bank that the branch working hours is between 10.00 a.m and 5.00 p.m, to complete the work, the

Officers of the Branch were working till 9.00 p.m on all working days. In order to assist them, the second respondent was retained till that time every day. Though the second respondent worked from 8.00 a.m to 9.00 p.m, there was no overtime wages. The second respondent is deemed to be a permanent employee by virtue of Section 3 of the Tamil Nadu Industrial Establishment (Conferment of Permanent Status to Workmen) Act.

3. Whereas the brief case of the petitioner/Management is as follows:

(i) According to the petitioner/Management, the second respondent was working in the Bank between 8.00 a.m and 10.00 a.m. He was employed for cleaning work in the bank and on certain occasions, he was engaged as " Water Boy" and never at any point of time, the 2nd respondent had to work full time of the day. His engagement was purely temporary due to exigencies of work. The work he performed was not against any permanent or sanctioned post.

(ii) According to the petitioner, the second respondent never worked continuously for 240 days in 12 calendar months or for 480 days in 24 calendar months. For engagement of the second respondent on daily wages, no appointment letter was issued to him nor he was required to sign attendance register. The second respondent was disengaged as there was no necessity for the petitioner Management to engage him. The disengagement w.e.f. 30.3.2005 cannot be construed to be retrenchment. Sec.25-f of the Industrial Disputes Act is not attracted nor the disengagement of the service of the second respondent is void-ab-initio.

(iii) The main work of the second respondent was binding work and for the said reasons, he obtained loan facilities from the petitioner Bank. The Bank also denied that the second respondent had assigned the name of " Muthu" to him.

4. When the matter was referred to Labour Court for adjudication, on the side of the second respondent employee, the second respondent was examined as WW1 and five documents Exs.W.1 to W.5 were marked and on the side of the petitioner/bank, two witnesses MW1 and MW2 were marked and 13 documents Exs.M.1 to M.13 were marked.

5. The Labour Court, after taking into consideration the case of both the parties, ordered reinstatement of the second respondent into service with full back wages, continuity of service and all attendant benefits. Further, the Labour Court directed the Management to take up the question of his regularisation into service and pass orders in his favour so that he is not deprived of fair and equal treatment with that of his counterparts, who have been regularised in service.

6. Aggrieved over the Award passed by the Labour Court in I.D.No.59 of 2007, the Management has filed the above writ petition.

7. Heard Mr.V. Karthick, learned counsel for the petitioner and Mr.Balan Haridas, learned counsel for the second respondent.

8. Mr.V. Karthick, learned counsel for the petitioner/Management mainly contended that the second respondent is only a casual workman or daily wager, working between 8.00 a.m and 10.00 a.m. Further, the learned counsel submitted that the second respondent has not worked either for 240 days in 12 calendar months or for 480 days in 24 calendar months. Therefore, according to the learned counsel for the petitioner, the dispute raised by the second respondent employee does not fall within the purview of the Industrial Disputes Act.

9. The learned counsel for the petitioner further submits that the Labour Court committed an error by ordering reinstatement with back wages and the appropriate remedy available to the second respondent is only a compensation and not reinstatement with back wages.

10. In support of his contention, the learned counsel relied on the following judgments:

(i) (2008) 3 SCC 474 (BSNL and Others vs Mahesh Chand),

wherein the Apex Court held that "when a Workman was temporarily employed as Safaiwala and was working for only 2 to 3 hours a day, he is not entitled to reinstatement and a compensation is the remedy".

(ii) (2009) 15 SCC 327 (Jagbir Singh vs Haryana State Agriculture Marketing Board and Another),

wherein, in the case of a workman who was engaged as Daily worker from 1.9.1995 to 18.7.1996 and if he raises an industrial dispute stating that he was illegally retrenched without following Sec.25-F of Industrial Disputes Act, the Apex Court held that compensation instead of reinstatement or backwages will serve the ends of justice."

(iii) (2010) 6 SCC 773 (Senior Superintendent Telegraph (Traffic), Bhopal vs Santosh Kumar Seal and Others.

In this case, the workmen were engaged as casual labourers in 1985 and were continued as such till 1987 and that when their services were terminated, the workmen approached the Industrial Tribunal with their grievance and the Tribunal by its Award directed the appellant to reinstate the

workmen and pay them back wages as the appellant had failed to comply with Section 25-F. The Apex Court held that the relief of reinstatement with back wages is not automatic and a compensation of Rs.40,000/- was awarded to meet the ends of justice."

(iv) (2010) 9 SCC 126 (Incharge Officer and Anr vs Shankar Shetty)

In this case, the workman was employed intermittently as a daily wager for 7 years and the Labour Court rejected the Workman's claim as he failed to prove that he had worked continuously for 240 days in the calendar year preceeding his termination. The Apex Court held that the employee is not entitled for reinstatement considering the workman was engaged only intermittently in the course of 7 years.

(v) (2013) 5 SCC 136 (Assistant Engineer Rajasthan Development Corporation and Another vs Gitam Singh.

In this case, the workman, engaged as daily wager, worked for 8 months. The Apex Court held that reinstatement need not be granted and a compensation of Rs.50,000/- meet ends of justice."

(vi) (2014) 7 SCC 177 (Bharat Sanchar Nigam Limited vs Bhurmal).

In this case, the Apex Court held that when services of daily wager are terminated illegally, he should be granted monetary compensation and not reinstatement with backwages.

(vii) (2014) 7 SCC 190 (Harinandan Prasad and another vs Employer I/R to Management of Food Corporation of India and Another).

The Apex Court held that it would be difficult to give the relief of reinstatement to the persons who were engaged as daily wagers and whose services are terminated in a distant past and further, the termination was held to be illegal on technical grounds of not adhering to the provisions of Sec.25F. While deciding whether to grant reinstatement or compensation, the nature of post, duration of engagement, delay in raising industrial dispute, time period which has elapsed from the time of termination have to be considered.

11. Countering the said submissions made by the learned counsel for the petitioner, Mr.Balan Haridas, learned counsel for the second respondent submitted that the Labour Court had rightly ordered

reinstatement with backwages, taking into consideration that the second respondent/employee had worked for more than 240 days in a calendar year and more than 480 days in 24 calendar months.

12. The learned counsel for the second respondent further submitted that the second respondent was employed by the petitioner Bank for more than 4 years and that he was working from 8.00 a.m to 9.00 p.m till the date of his termination, therefore, the second respondent has rightly ordered for reinstatement with full back wages and other allowances.

13. In support of his contention, the learned counsel for the second respondent relied on the following judgments:

(i) CDJ 2003 MHC 1697(V. Ravichandran vs The Director Employment & Training & Others), wherein this Court held as follows:

"7. That apart, there is one more aspect in this matter as to the applicability of even Section 3(1)(d) of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 to the case of the petitioner. Admittedly, the petitioner was appointed in the year 1992 as casual labour and was subsequently absorbed only as Peon. He is an unskilled worker. The provisions of the said Act are not applicable to the case of an unskilled worker. This view has been taken by me in "The Management of Tiruttani Cooperative Sugar Mills Limited, Tiruvalangadu vs The Presiding Officer, Industrial Tribunal, Madras and Another (2001) (1) LLJ 589)". That judgment was based on a Division Bench judgment of this Court in "The School Committee and Another vs District Educational Officer (1991 TMLJ 1)". For the said reason also, the impugned letter dated 17.6.96 directing the services of the petitioner to be terminated on the ground that he was not appointed through employment exchange is unsustainable."

(ii) 2009 (1) SCC (L&S) 55 (Divisional Manager, New India Assurance Co Ltd vs A. Sankaralingam), wherein the Apex Court has held as follows:

"10. In the light of the above decisions, the question for consideration, which has been hotly debated, is the status of a part-time employee and as to whether such an employee falls within the definition of "workman", Section 2(s) of the Act deals with the definition of "workman" whereas Section 25-B talks about "continuous service. Both these provisions are reproduced below:

"2.(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

25-B. Definition of continuous service - For the purposes of this Chapter:

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -

(a) for a period of one year, if the workman, during a period of twelve calendar months preceeding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceeding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

A bare perusal of the two definitions would reveal that their applicability is not limited to only full-time employees but all that is required is that the workman claiming continuous service must fulfill the specific conditions amongst others laid down in the two provisions so as to seek the shelter of Section 25-F."

(iii) (2009) 2 SCC (L&S) 513 (Maharashtra State Road Transport Corporation and another vs Casteribe Rajya Parivahan Karmchari Sanghatana), wherein the Apex Court has held as follows:

"34. It is true that Dharwad Distt. PWD Literate Daily Wages Employees' Assn. Arising out of industrial adjudication has been considered in Umadevi (3) and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in Umadevi (3) leaves no manner of doubt that what this Court was concerned in Umadevi (3) was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.".

(iv) (2010 (1) SCC 47 ((Director, Fisheries Terminal Department vs Bhikubhai Meghajibhai Chavda), wherein the Apex Court has held as follows:

16. This Court in R.M. Yellatti v. Asstt. Executive Engineer² has observed: (SCC p. 116, para 17)

"17. ... However, applying general principles and on reading the [aforesaid] judgments, we find that this Court has repeatedly taken the view that the burden

of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."

(v) 2010 3 SCC 192 (Harjinder Singh vs Punjab State Warehousing Corporation), wherein, the Apex Court has held as follows:

Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalisation and liberalisation are fast becoming the *raison d'être* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganised workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman /employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.

(vi) (2010) 5 SCC 497 (Anoop Sharma vs Executive Engineer, Public Health Division No.1, Panipat (Haryana), wherein the Apex Court has held as follows:

18. This Court has used different expressions for describing the consequence of terminating a workman's service/employment/engagement by way of retrenchment without complying with the mandate of Section 25-F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Sections 25-F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service was not terminated.

19. The question whether the offer to pay wages in lieu of one month's notice and retrenchment compensation in terms of clauses (a) and (b) of Section 25-F must accompany the letter of termination of service by way of retrenchment or is it sufficient that the employer should make a tangible offer to pay the amount of wages and compensation to the workman before he is asked to go was considered in National Iron and Steel Co. Ltd. v. State of W.B.²⁴ The facts of that case were that the workman was given notice dated 15-11-1958 for termination of his service with effect from 17-11-1958. In the notice, it was mentioned that the workman would get one month's wages in lieu of notice and he was asked to collect his dues from the cash office on 20-11-1958 or thereafter during the working hours. The argument of the Additional Solicitor General that there was sufficient compliance with Section 25-F was rejected by this Court by making the following observations: (AIR p. 1210, para 9).

(vii) (2011) (6) SCC 584 (Devinder Singh vs Municipal Council, Sanaur), wherein the Apex Court has held as follows:

17. Section 25-F is couched in a negative form. It imposes a restriction on the employer's right to retrench a workman and lays down that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched until he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or he has been paid wages for the period of notice and he has also been paid, at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months and notice in the prescribed manner has been served upon the appropriate Government or the authority as may be specified by the appropriate Government by notification in the Official Gazette.

19. In *Anoop Sharma v. Public Health Division*⁸ the Court considered the effect of violation of Section 25-F, referred to various precedents on the subject and held the termination of service of a workman without complying with the mandatory provisions contained in Sections 25-F(a) and (b) should ordinarily result in his reinstatement.

(viii) An unreported Judgment in WP No.5976 of 2009 dated 23.9.2011 (*The Management of Maclellan vs M.Ravi and others*), wherein this Court has held as follows:

11. No doubt, in the present case, the Labour Court went by the stand of the workman that it was a case of retrenchment under Section 25F of the ID Act. The term 'retrenchment' is defined under Section 2 (oo) of the ID Act. As per the said section, retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. Since the petitioner has taken a definite stand that it was a case of dismissal for the misconduct of unauthorised absence, the Labour Court could not have held that it was a case of retrenchment covered by Section 2 (oo) read with Section 25F of the ID Act and to that extent the counsel for the petitioner may be justified in stating that the award requires interference. But, at the same time, only for that purpose this Court is not inclined to remand the matter for afresh consideration on the relief claimed by the first respondent.

12. The Supreme Court in Gujarat Steel Tubes Limited vs Gujarat Steel Tubes Mazdoor Sabha, (1980) 2 SCC 593 has held that if for some reason the arbitrator/adjudicator does not decide the lis between the parties, this Court exercising the power under Article 226 of the Constitution of India or the Supreme Court under Article 136 of the Constitution of India are not powerless for interfering with the award and the Courts themselves can grant relief in such matters. Therefore, since necessary ingredients are present in this case to go into the question of non employment of the first respondent and the Labour Court has erroneously held that it was a case of retrenchment, this Court is of the view that such finding was not warranted. But, at the same time, for the purpose of unauthorised absence it has to be seen whether the petitioner has acquitted themselves in satisfying the Labour Court on the misconduct committed by the first respondent."

13. When a full-fledged enquiry is held by the employer and thereafter the matter is brought before the adjudicating form, there is justification to contend that the Labour Court must have strong reasons to disagree with the findings rendered by the employer. But in a case where the enquiry is vitiated or for the first time evidence is let in before the Labour Court, then the satisfaction of the misconduct or otherwise is for the Labour Court and therefore, the standard of proof that is required is much higher than a domestic enquiry forum. This position of law has been clarified by the Supreme Court in Workmen vs M/s Firestone Tyre and Rubber Co of India (P) Ltd (1973) 1 SCC 813."

(ix) 2014(2) LLN 564 (SC) (Hari Nandan Prasad and another vs Employer I/R to Management of FCI and another), wherein the Apex Court has held as follows:

"34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularisation only because a Worker has continued as Daily Wage Worker/ad hoc/Temporary Worker for number of years. Further, if there are no posts available, such a direction for regularisation would be impermissible. In the aforesaid circumstances, giving of direction to regularise such a person, only on the basis of number of

years put in by such a Worker as Daily Wager, etc., may amount to backdoor entry into the service which is an anathema to Article 14 of the Constitution Further, such a direction would not be given when he concerned Worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated Workmen are regularised by the Employer itself under some scheme or otherwise and the Workmen in question, who have approached Industrial/Labour Court are at par with them, direction of regularisation of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the Industrial Adjudicator would be achieving the equality by upholding Article 14, rather than violating this Constitutional provision.

38. Non-regularisation of Appellant No.2, while giving the benefit of that Circular dated 6.5.1987 to other similar situated Employees and regularising them would, therefore, be clearly discriminatory. On these facts, the CGIT rightly held that he was entitled to the benefit of scheme contained in circular dated 6.5.1987. The Division Bench in the impugned Judgment has failed to notice this pertinent and material fact which turns the scales in favour of Appellant No.2. High Court committed error in reversing the direction given by the CGIT, which was rightly affirmed by the learned Single Judge as well, to reinstate Appellant No.2 with 50% back wages and to regularise him in service. He was entitled to get his case considered in terms of that Circular. Had it been done, probably he would have been regularised. Instead, his services were wrongly and illegally terminated in the year 1990. As an upshot of the aforesaid discussion, we allow these appeals partly. While dismissing the Appeal qua Appellant No.1, the same is accepted in so far as Appellant No.2 is concerned. In his case, the judgment of the Division Bench is set aside and the award of the CGIT is restored. There shall, however, be no order as to costs.

(x) (2014) (2) SCC 600 (Management of Sundaram Industries Limited vs Sundaram Industries Employees Union), wherein the Apex Court has held as follows:

18. On behalf of the appellant it was contended that the respondent workmen were not legally entitled to assail the finding of the Tribunal on the charges framed against them, as the workmen

had not assailed the award made by the Tribunal before the High Court. The findings of the Tribunal had on that account attained finality. We do not think so. The Tribunal had no doubt held the charges to have been proved but it had, despite that finding, set aside the dismissal of the workmen on the ground that the same was disproportionate to the gravity of the misconduct. It had on that basis directed reinstatement with 50% back wages. To that extent the award was in favour of the workmen which they had no reason to challenge. But that did not mean that in any proceedings against the award, the respondent workmen could not support the direction for their reinstatement on the ground that the finding of the Tribunal regarding proof of misconduct was not justified.

(xi) (CDJ 2014 MHC 3755) (Amanullah vs The Chennai Port Trust and Another), where this Court has held as follows:

23. From the above cited case laws, it is very clear that the Labour Court in order to render substantial justice, is empowered to adjudicate the real dispute between the parties, when the order of reference is capable of interpreting to the effect that the Labour Court can go into the incidental issue also. If no such power is vested on the Labour Court, making of such reference would be meaningless and purposeless. If the main issue is of such nature that it cannot be decided without going into the incidental issue, it is always permissible to go into such incidental issue as well and give a finding thereon before deciding the main issue. Such exercise cannot be said as without jurisdiction.

(xii) (2013) (10) SCC 324 (Deepali Gundu Surwase vs Kranti Junior Adhyapak Mahavidyalaya (D.ED) and others), wherein the Apex Court has held as follows:

38. The propositions which can be culled out from the aforementioned judgments are:

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for . prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees⁷.

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal⁵ that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches^{7,8} referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

14. According to the Management, the admitted engagement of the employee was for cleaning work of the bank premises and therefore, he cannot be termed as a "workman" under the Industrial Disputes Act. However, the employee contended that he had worked full time with the Management Bank from 8.00 a.m to 9.00 p.m on all working days and that, he worked for more than 240 days in a calendar year and 480 days in 24 calendar months.

15. It is pertinent to note that the Management had not proved that the engagement of the employee was not under the authority of any competent official. It is also brought to the notice of this Court that in the Attendance Register, the Management had mentioned the name of "Muthu", however in the bracket, they have mentioned the name of the second respondent herein viz., D.L. Sekar. The reason for mentioning the other person's name instead of mentioning the second respondent's name cannot be in good taste. Except the Management, no one could have written the name of a fictitious person in the Attendance Register.

16. As rightly observed by the Labour Court, the engagement of casual workmen is not totally unknown and in such context, such engagement are given status of perpetuity for the process of regularisation in deserving cases.

17. The contention of the learned counsel appearing for the petitioner/Management that, in Ex.M.1, the loan application form, the employee had mentioned as "unemployed", therefore, he was not under the employment of the petitioner/Management, cannot stand for the reason that for the purpose of availing loan, he had given the application mentioning as "unemployed". When other materials are available before the Court and that he had also signed the Attendance Register before the petitioner/Management, merely mentioning as "unemployed" in the loan application form is not fatal to the case of the employee in any manner.

18. On a perusal of evidence of M.W.2, the Deputy Manager of the petitioner/Bank, it is clear that he had admitted that the second respondent employee had worked as Sub-Staff from 01.09.2001 to 30.03.2005 continuously. Further, he has also admitted that the Bank had not given any notice prior to disengagement of the employee.

19. Admittedly the employee was not given any appointment order. M.W.2 also admitted that as on 1.7.1975 seniority list of Sub Staffs was maintained and some of the Sub-Staff have been regularised. Further, he had admitted that regularised Sub-Staff were not recruited through Employment Exchange.

20. When M.W.2 himself had admitted that the second respondent employee was working continuously from 2001 to 2005, mere mentioning of "unemployed" in Ex.M.1 loan application shall not place the employee in a disadvantageous position. It is the specific case of the employee that he had worked for 240 days in one calendar year and 480 days in 24 calendar months. The petitioner/Management could have produced the Attendance Register during the relevant period to disprove the case of the employee for the reason that only the Management will be in a position to produce the relevant document before the Court. One cannot expect the employee to produce the Attendance Register, which is not in his possession to prove that he worked for 240 days in a year and 480 days in 24 calendar months.

21. Even with regard to the contention raised by the petitioner/Management that the second respondent was engaged only for the purpose of binding work, the petitioner/Management has not substantiated the said contention by any acceptable evidence before the Labour Court. The vouchers issued by the Bank would also establish that the second respondent was working as Messenger during the year 2004. In the year 2002, he was doing cleaning work in the petitioner Bank. The petitioner also produced the vouchers for the period between January 2002 and December 2004. The Attendance Register filed along with the typed set would also establish that the second respondent was continuously working with the petitioner/Management.

22. Even with regard to the admission made by M.W.2, the Management had not clarified the same by way of re-examination. When the similarly placed workmen, who were not appointed through Employment Exchange, have been regularised, the petitioner/Management had discriminated the second respondent, by not regularising his service.

23. When an arrangement is permitted during exigencies, the same may not yet be illegal, but may be irregular, which is normally set right by process of regularisation. From the available evidence, the Labour Court has rightly come to the conclusion that the second

respondent had worked for more than 240 days in a Calendar Year and 480 days in 24 Calendar months. Such being the case, the petitioner/Management should have followed the provisions of Sec.25-F of Industrial Disputes Act.

24. It is an admitted fact that no notice was issued to the second respondent employee prior to his termination. When the second respondent is entitled to certain statutory benefits under the Industrial Disputes Act, the petitioner/Management should have followed the mandatory provisions of Sec.25-F of the Industrial Disputes Act.

25. In the case on hand, the second respondent employee was discriminated by the petitioner Bank by not regularising his services, though he had worked for more than the statutory period. Though there is no dispute with regard to the ratio laid down in the judgments relied upon by the learned counsel for the petitioner/Management, since the facts and circumstances of the case on hand differs from the cases relied upon by the learned counsel for the petitioner, the same are not applicable to the present case.

26. Following the ratio laid down in the judgments relied upon by the learned counsel for the second respondent, I am of the considered view that the Labour Court had rightly ordered reinstatement of the second respondent into service with full back wages, continuity of service and all attendant benefits.

27. Further, the Labour Court had also rightly directed the Management to take up the question of his regularisation into service after his reinstatement and pass orders in his favour, so that he is not deprived of fair and equal treatment with that of his counterparts who have been regularised in service.

28. The learned counsel for the petitioner further submitted that the Labour Court had passed the Award beyond the term of the reference. The Industrial Dispute was referred to Labour Court for adjudicating the issue "Whether the action of the Management of State Bank of India, Chennai in terminating the services of Sri D.L. Sekar, is legal and justified? If not, to what relief the workman concerned is entitled?"

29. On a perusal of the Award, it is clear that the Labour Court had not exceeded its jurisdiction beyond the term of reference. The reinstatement with backwages and continuity of service are within the scope of reference made before the Labour Court. In these circumstances, the contention raised by the learned counsel for the petitioner/Bank is rejected.

30. Since the petitioner/Management had not followed the mandatory provisions of Sec.25-F of Industrial Disputes Act, the termination of the second respondent employee is liable to be set aside, which was rightly set aside by the Labour Court.

31. In these circumstances, I do not find any ground to interfere with the Award passed by the Labour Court.

32. In the result, the writ petition stands dismissed. No costs.

sr.

-s/d-

Assistant Registrar(CO)

Dt:10/2/2015

True Copy

Sub-Assistant Registrar

To

The Presiding Officer,
The Central Government Industrial
Tribunal-cum-Labour Court, Chennai

+ 1 cc to M/s.T.S.Gopalan & Co Advocate SR 6278

+ 1 cc to M/s.Balan Haridoss, Advocate SR 6251

rk(co)
prk13/2

W.P.No.26937 of 2010

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