

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2015

CORAM :

THE HONOURABLE MR. JUSTICE T. RAJA

W.P.NO. 24773 OF 2006

The New India Assurance Company Ltd., .. Petitioner

Vs.

1. The Central Government Industrial
Tribunal cum Labour Court
"B" Wing, 26 Haddows Road
Shastri Bhavan, Chennai - 600 006.

2. P. Vijayaraghunathan ... Respondents

PRAYER: This Writ petition is filed under Article 226 of Constitution of India, praying for the issuance of a Writ of Certiorari, to call for the records relating to impugned award dated 04.10.2005 made in I.D. No. 406 of 2004 on the file of the Central Government Industrial Tribunal cum Labour Court, Chennai - 6 the first respondent herein and quash the same and to pass such further orders.

For Petitioner : Mr. P. Sukumar
For Respondents : Mr. Balan Haridoss for R2
R1 -Court

O R D E R

The New India Assurance Company Limited has filed this Writ Petition challenging the impugned order passed by the Central Government Industrial Tribunal-cum-Labour Court, Chennai in I.D. No. 406 of 2004 dated 04.10.2005, wherein learned Industrial Tribunal has held that the second respondent Mr. P. Vijayaraghunathan has established the fact that he has completed more than 240 days in a continuous period of 12 calendar months before his termination and since the petitioner has not followed the procedure laid down under Section 25F of the Industrial Disputes Act, he is entitled to be reinstated in service with continuity of service along with half of the backwages.

2. Mr. P. Sukumar, learned counsel appearing for the petitioner, assailing the findings and conclusions reached by the learned Industrial Tribunal, which has completely misconstrued itself

in reaching a wrong conclusion that the second respondent had established his case that he had worked for more than 240 days from 01.04.2000 to 16.06.2001, more particularly when the collection of vouchers filed by him do not even indicate that he had worked for 240 days during the aforementioned period, sought for interference. Adding further, he stated that when the list was brought to the Industrial Tribunal by the second respondent, the petitioner Management brought to the notice of the learned Industrial Tribunal all the facts that the second respondent was given work only as and when such need arose during April 2000 to June 2001 but during that time he was not given work continuously for 240 days, therefore, when the petitioner Management has rightly brought to the notice of the learned Industrial Tribunal that although he had worked during April 2000 to June 2001, he had not at all worked for 240 days continuously, the second respondent ought to have established his case clearly, without leaving any doubt in respect of completion of his 240 days during the said period, in this respect he had failed to do so, but, surprisingly the learned Industrial Tribunal has erroneously come to the conclusion that the second respondent had established that fact.

3. Continuing his argument he had stated that the services of the second respondent was utilised only for doing miscellaneous works like cleaning work etc. The nature of work given to him was purely based on requirement at particular point of time and since such requirements have not arisen for the petitioner Management, the services of the second respondent was not utilised. Taking advantage of the fact that he was employed as a daily wage employer during the period April 2000 and June 2001, he had tried to establish that he had worked for 240 days during that particular period. Learned Industrial Tribunal also merely accepting the statement made by the petitioner Management in the counter, wrongly proceeded in the impugned award that the petitioner Management has accepted the case of the second respondent that he had worked for 240 days in a continuous period of 12 calendar months and in such circumstances, the petitioner Management has not followed the mandatory provision of Section 25-F of the Industrial Disputes Act, without any basis.

4. Mr. Sukumar, learned counsel appearing for the petitioner again indicating the other findings recorded by the Industrial Tribunal would submit that the learned Industrial Tribunal has miserably failed to appreciate one another vital fact that the second respondent was utilised only as a daily rated employee for doing a specific sort of work and he was not at all employed as a full time sub staff. When this was the contention of the petitioner Management, the learned Tribunal had wrongly held that he has worked for 240 days, by placing reliance on the gained over documents, namely, the internal correspondences of the petitioner Management which were scrupulously removed from the files of the company and laid into the hands of the second respondent. It is for this reason,

the petitioner Management was unable to produce the file before the Tribunal at the time of trial. Ignoring this crucial aspect, learned Tribunal committed serious error by adding 50 days of holiday period to compute 240 days of continuous work in a 12 block of calendar months. Therefore, the approach adopted by the learned Labour Court in examining and resolving the dispute stands vitiated and hence the same is liable to be set aside. Concluding his argument learned counsel finally submitted that the learned Tribunal while dealing with Section 25F of the Industrial Disputes Act which, ought to have held that the said provision in the present case cannot be attracted, however wrongly applying the said section it has again come to the conclusion that the second respondent employee, who is not entitled for the benefits envisaged, directed reinstatement with continuity of service along with 50% of the backwages.

5. The above approach is clearly running contrary to the ratio applied by the Hon'ble Apex Court in the case of Surinder Prasad Tiwari vs. U.P. Rajya Krishi Utpadan Mandi Parishad & Ors., reported in (2006) 7 SCC 684, wherein in a similar and identical circumstances, the Hon'ble Apex Court has held that the courts cannot countenance appointments to public office which have been made against the constitutional scheme, once a prima facie case is made out that an employee is appointed on daily wage basis without following any procedure required for regular appointment. Considering a similar case that an employee continued in service for 14 years because of the interim order granted by the High Court, the Apex Court had come to a conclusion that merely because an employee had continued under cover of an order of the court, which the Court has described as 'litigious employment', he would not be entitled to any right to be absorbed or made permanent in the service. Since this aspect of the matter has been already dealt with the Constitution Bench in the case of Secretary State of Karnataka v. Umadevi (2006) 4 SCC 1, admittedly in the present case also since the second respondent has not been appointed under the relevant rules or in adherence to Articles 14 and 16 of the Constitution, the ratio laid down by the Hon'ble Apex Court in the case of Surinder Prasad Tiwari vs. U.P. Rajya Krishi Utpadan Mandi Parishad & Ors., should be applied by reversing the impugned award for the simple reason that the second respondent in the present case had entered into the service of the petitioner Management as a daily wager, therefore his engagement is not gauged on proper selection under relevant rules or procedure. That apart, he was also aware of the consequences of the appointment being temporary, casual or contractual in nature, therefore, such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection.

6. Pleading finally he has argued that when the petitioner Management has repeatedly argued before the learned Industrial

Tribunal that he was appointed only as a daily wager and not on permanent basis, the learned Industrial Tribunal by no stretch of imagination should have come to the conclusion that the second respondent employee had worked for 240 days continuously. In support of his submission he has also relied upon one another judgment in the case of Municipal Council, Sujampur vs. Surinder Kumar, reported in (2006) 5 SCC 173, for a proposition that since the relief to be granted in terms of Section 11-A of the Industrial Disputes Act is discretionary in nature, the Labour Court was required to consider the facts of the case. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically. But in the present case even without proper finding based on any acceptable evidence, that the second respondent had worked for more than 240 days during the relevant period namely, 01.04.2000 to 16.06.2001 as though the petitioner Management has admitted his continuous employment from 01.04.2000 to 16.06.2001, the learned Industrial Tribunal has come to an erroneous conclusion, therefore, the direction for reinstatement with continuity of service along with 50% backwages cannot be allowed to stand to the scrutiny of the law laid down by this Court as well as the Apex Court, he pleaded.

7. In reply, Mr. Balan Haridoss, learned counsel appearing for the second respondent would submit that it is not the case of the second respondent that he had worked during the relevant period namely, 01.04.2000 to 16.06.2001 alone. Whereas the records produced by both parties before the learned Industrial Tribunal clearly speak that the second respondent was employed even in the year 1992 and had continued in service till 1998. The cross examination of Mr. P.Vijayaraghunathan, the second respondent employee who was examined as WW1, has also admitted the fact that he was employed as daily wager in the petitioner Management and had worked during 1992 to 1998 as sub staff in a regular vacancy, therefore, it is not proper for the petitioner Management to say that the second respondent was appointed only on casual and need basis. Besides, various documents produced by the second respondent amply prove the fact that the performance shown by the second respondent during the relevant period from 1992 to 1998 has been accepted by a responsible officer of the petitioner Management to recommend his case for regularisation. Ex.W-8 dated 01.12.2000 also shows that the Administration Officer Mr. S. Vinnarasu on receipt of the representation from the Association/ Union to regularise the services of the second respondent as sub staff has forwarded the same to the Divisional Officer. Another communication dated 03.01.2001 has been marked as Ex.W-9, wherein the Divisional Manager of the petitioner Management has certified that the particulars with regard to his employment from 1992 to 1998 were found to be correct and genuine.

8. That apart, Ex.W-10 marked before the learned Industrial Tribunal also clearly shows that as per record the second

respondent was employed on temporary basis and his services were utilised during the period 1987 to 1992 for preparing Premium Register, all Outgos' Statements, despatch work and miscellaneous work including the work of sub staff. Again heavily relying on the statement that he had worked as Sub staff for the period commencing from April 2000 to June 2001, Mr. Balan Haridoss, learned counsel would submit that a close and complete reading of Exs.W-6 and W-7 the bunch of vouchers, would clearly prove the case of the second respondent that he has worked for more than 240 days. More than above, the respondent also in their counter filed before learned Industrial Tribunal admitted that the second respondent was employed temporarily to do certain miscellaneous work during the period commencing from April 2000 to June 2001, therefore, when the burden of proof was satisfactorily established by the second respondent proving that he had worked for 240 days in a given year, as per the ratio laid down by the Hon'ble Apex Court in the case of the Director, Fisheries Terminal Department vs. Bhikubhai Meghajibhai Chavda reported in (2010) 1 SCC 47, the burden of proof shifts to the petitioner Management to show that the employee has not worked for 240 days during the period, but the petitioner Management had miserably failed to discharge the same, therefore, the learned Tribunal accepting the claim of the second respondent held that the claim of the employer has been proved.

9. It is further submitted by the learned counsel for the second respondent that a cursory reading of a letter dated 03.07.2001 of the Divisional Manager, amply proves the case of the second respondent that the said Divisional Manager himself has clearly admitted that the second respondent employed continuously from 1987 to 1992 on temporary basis. While considering his request, the Divisional Manager has further certified that the second respondent has got excellent public contracts in Kanchi and that every dignitary, who visited Kanchi, has commended the services rendered by him. Adding further, he stated that one of the issues raised before the learned Industrial Tribunal is that whether the second respondent employee worked during the relevant period namely from 01.04.2000 to 16.06.2001 was rightly established by discharging the burden of proof by the second respondent. It has been accepted by the Industrial Tribunal that the burden has been successfully discharged as he has stepped into the witness box on the basis of both oral and documentary evidences. In view of the cogent evidence both oral and documentary produced by the second respondent, the learned Industrial Tribunal, taking note of the stand of the petitioner Management in their counter that the second respondent has also worked during the relevant period has rightly reached the finding of fact that the second respondent who has joined the service of the petitioner Management even in the year 1992 has worked till 1998 and subsequently being re-employed from 01.04.2000 to 16.06.2001 has completed 240 days. Therefore such a finding based on both oral and

documentary evidences need not be disturbed, under Article 226 of the Constitution of India.

10. While replying to the contention raised by learned counsel appearing for the petitioner Management that the ratio laid down by the Hon'ble Apex Court in Umadevi's case has been relied on by the learned Industrial Tribunal, Mr. Balan Haridoss taking support of the order passed by the Hon'ble Apex Court in the case of Maharashtra State Road Transport Corporation & anr. vs. Casteribe Rajya Parivahan Karmchari Sanghatana reported in (2009) 2 SCC (L&S) 513, has submitted that Umadevi's case does not denude Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the Maharashtra Recognition of Trade Union & Prevention of unfair Labour Practice Act, to order permanency of workers who have been victims of unfair labour practice on the part of employer. When the Apex Court has repeatedly held that Umadevi's case cannot be overridden by the orders passed by the Industrial and Labour Courts, once the unfair labour practice on the part of the employer is established, the plea of learned counsel appearing for the petitioner Management that the decision in Umadevi's case is required to be applied, should be discarded in the light of the decision awarded in Maharashtra State Road Transport Case.

11. I find some merits in the above submission. As mentioned above, the second respondent entered the service of the petitioner Management and had worked as Sub staff during the period 1992 to 1998. This could be seen from Ex.W-8 dated 01.12.2000. Ex.W-9 dated 03.01.2001 sent by the Divisional Manager of the petitioner Management also shows that the second respondent has worked during the period 1992- 1998 as Sub Staff. A closure reading of Ex.W-8 and W-9 shows that when a request letter was made on behalf of the second respondent by the Union for his regularisation, particulars were called for from the Divisional Manager. The Divisional Manager in Ex.W-10 dated 07.03.2001 has mentioned as follows :

' It would not be out of place to mention whenever any Dignitary visited Kanchipuram, Mr. P. Vijayaraghunathan's services were utilised for. Mr. P. Vijayaraghunathan has got excellent public contacts in Kanchi. Every dignitary who visited Kanchi has commended the services rendered by him. Especially, when the Regional Managers and the Executives visited Kanchi after the conclusion of RMs' Conference, recently, he has conducted credibly drawing all round appreciation. We hope we have clarified the matter. '

When Ex.W-10 sent by the Divisional Manager of the Petitioner Management also shows that the second respondent services were utilised in public contacts in Kanchi and every dignitary who visited

Kanchi has recommended the services rendered by him, especially the dignitaries who visited the RMs' Conference have also been satisfied with the performance of the second respondent, it goes without saying that the second respondent not only during the period 01.04.2000 to 16.06.2001 namely, the relevant period but even prior to the said period also the second respondent was employed as a sub staff. However, the point for consideration is whether he had worked for 240 days during the relevant period i.e. from 01.04.2000 to 16.06.2001.

12. Admittedly, the second respondent while raising the Industrial Dispute has produced certain copies of internal correspondences which have been referred by this Court above. Therefore, the learned Industrial Tribunal after considering the stand taken by the Petitioner Management in their counter that the second respondent has worked during the relevant period, placing heavy reliance on the set of vouchers marked as Ex.W-7, rightly came to the conclusion that the second respondent has completed more than 240 days in a continuous period of 12 calendar months. On this basis, a further conclusion has been reached holding that the petitioner Management has not followed the procedure laid down under Section 25 F of the Industrial Disputes Act. Hence, it has been held that the termination of the second respondent services is illegal. Such a finding, in my considered view, cannot be interfered with.

13. Further, a careful and complete reading of the ratio in State of Karnataka v. Umadevi ((2006) 4 SCC 1) leaves no manner of doubt that what the Supreme Court concerned with in Umadevi's case, was regarding exercise of power by High Courts under Article 226 and the Supreme Court under Article 32 of the Constitution in matters of public employment where the employees have been engaged as contractual, temporary or casual workers, not based on proper selection as recognized by rules or procedure. No doubt, Umadevi's case is an authoritative pronouncement for the proposition that the Supreme Court under Article 32 and the High Courts under Article 226 should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless recruitment itself was made regularly in terms of constitutional scheme. But, the present case is not the one this Court is called upon to give permanency to the second respondent. The issue involved in this writ petition is questioning the correctness of the Award. As a matter of fact, when the second respondent preferred Industrial Dispute, the learned Tribunal, after going through the original documents such as Exs.W1 to W10, has come to the conclusion that the second respondent has completed more than 240 days in a continuous period of 12 calendar months. Whiles, the petitioner management has failed to follow the mandatory provision of Section 25F of the Act. On this score, it has reached a conclusion that the termination of the second respondent is illegal and void ab initio. Such a finding of fact recorded by the tribunal cannot be easily quashed.

14. It is well settled law that an error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. If, similarly, a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ Court. But, in the present case, Ex.W10 dated 03.07.2001 sent by the Divisional Manager, read with Exs.W8 and W9 clearly shows that the second respondent had worked for more than 240 days in a continuous period of 12 calendar months. Therefore, such a finding recorded by the Tribunal does not warrant any interference.

15. Thus, for the above said reasons, the Writ Petition fails and the same is dismissed. However, as the Labour Court has confined the benefit of backwages to 50%, giving continuity of service, Mr. Balan Haridoss learned counsel appearing for the second respondent has also submitted that in the event of the second respondent's reinstatement he would forego the same. Accepting his statement, this Court directs the petitioner Management to reinstate the second respondent by giving continuity of service with 50% of the backwages alone. No order as to costs.

avr

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

The Central Government Industrial
Tribunal cum Labour Court
"B" Wing, 26 Haddows Road
Shastri Bhavan, Chennai - 600 006.

+ 1 cc to Mr.Balan Haridoss, Advocate SR 7084

+ 1 cc to Mr.P.Sukumar, Advocate SR 7011

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