

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21.01.2016

Date of Reserving the Order	Date of Pronouncing the Order
06.01.2016	21 .01.2016

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P.No.21349 of 2003
& W.P.M.P.No.36920 of 2005

The Management of The Tamil Nadu
Handloom Weavers Co-operative Society Ltd.,
(Co-optex)
Rep., by its Regional Manager,
Chidambaram Road,
Cuddalore. Petitioner

Vs.

1.The Deputy Commissioner of Labour,
Office of the Commissioner of Labour,
Chennai - 600 006.
2.Tmt Vanathidevi, Respondents

Prayer :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for the records of the first respondent dated 11.04.2003 and made in TSE No.2/16/2001 and quash the same.

For petitioner ... Mr.N.Thiagarajan

For Respondents .. Mr.R.Rajeswaran Spl., G.P., for R1
Mr.V.S.Sivasundaram for R2

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O R D E R

The petitioner is the Management of the Tamil Nadu Handloom Weavers Co-operative Society (hereinafter referred to as the 'Society') and the challenge is to the order passed by the first respondent, dated 11.04.2003, under the provisions of the Tamil Nadu Shops and Establishment Act, 1947 (hereinafter referred to as the 'Act').

2. The second respondent herein filed an application before the first respondent under Section 41(2) of the Act contending that the oral termination of her services with effect from 13.07.2000 is not sustainable and prayed for reinstatement with continuity of service, backwages and other attendant benefits.

3. The case of the second respondent was that she has been working in the retail stores run by the petitioner's society for 17 years and the last spell was from 12.05.1999 to 31.05.2000 and that she has completed 240 days, however, she has been kept as a daily wage employee and paid Rs.900/- per month as wages calculated at the rate of Rs.30/- per day. It is the further case of the second respondent that since she was kept as daily wage employee since 1983 onwards, she submitted representation to the Hon'ble Minister for Handloom and Textiles requesting that her services may be regularised and she may be made as permanent employee of the petitioner society. The second respondent came to know that pursuant to the representation, it appears that report was called for from the concerned Regional Manager as to why the second respondent was kept as a daily wage employee and this had resulted in the officer getting infuriated resulting in the oral termination of the services of the second respondent. Along with the petition, the second respondent produced three documents namely, the representation sent to the Managing Director, dated 21.06.2000, letter from the Hon'ble Minister, dated 22.06.2000, and photostat copy of the salary particulars for the month of June 2000.

4. The petitioner Management resisted the application by filing a counter statement inter alia contending that they are a co-operative society and they are governed by recruitment rules and unless and until a candidate satisfies the minimum criteria for recruitment, is not entitled to participate in the selection and the question of regularising the services of the second respondent does not arise. Further, it is stated that the second respondent used to approach the concerned Branch Manager of the various shop requesting for daily wage employment and as and when required her services were engaged. The allegation that the second respondent had completed 240 days was denied. The other allegation made regarding the representation to the Hon'ble Minister, the alleged report said to have been called for etc were also denied in the counter statement.

5. The second respondent filed proof affidavit and marked 29 documents to substantiate her case. Written arguments were submitted by petitioner Management reiterated the stand taken in their counter affidavit. The first respondent by the impugned order allowed the appeal petition filed by the second respondent and held that the oral termination of the second respondent was not justified. Aggrieved by the same, the petitioner society has filed the present Writ Petition.

6. The learned counsel appearing for the petitioner contended that the provisions of the Act would not be applicable to the case of the second respondent as she was only a daily wage earner and her services were never dispensed with by an order passed by the Managing Director of the petitioner society. Further it is submitted that it is the case of the second respondent herself that her services were orally dispensed with by the Sales Manager of the Depot. Further, it is submitted that the first respondent ignored the material evidence that the temporary appointment orders to be regular orders of appointment relating to the period from 09.02.1996 to 09.07.1998 which is prior to the period of temporary appointment i.e., from 17.05.1999 to 31.05.2000. Further it is submitted that appointment to the petitioner organisation which is a co-operative society shall be in accordance with the rules and no appointment can be made dehorse the rules and without reference to the employment exchange. Further, it is contended that the documents namely Exhibits P5, P11, P14, P15 & P16 are only documents to prove the engagement of the second respondent on temporary basis for one or two months on nominal muster roll which could not have been the basis for directing regularisation of the second respondent. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Mohan Lal vs. The Management of M/s.Bharat Electronics, Ltd., reported in AIR 1981 SC 1253, to explain as to how the period of 240 days of continuous service has to be calculated. Reliance was also placed on the decision in the case of Manager, Reserve Bank of India vs. S.Mani & Ors., reported in (2005) 5 SCC 100, with regard to the burden of proof in cases where regularisation is sought for on the ground that the employee has completed 240 days of continuous service.

7. The learned counsel appearing for the second respondent submitted that the first respondent has considered the oral and documentary evidence placed by the second respondent and after appreciating the documents recorded a clear finding that the second respondent had been working for more than 240 days and that the Authority observed that the Management has not discharged the burden cast upon them and did not produce any documents before the Authority and further this Court exercising jurisdiction under Article 226 of the Constitution may not interfere with the factual findings recorded by the first respondent.

8. Heard the learned counsels appearing for the parties and perused the materials placed on record.

9. The scope of judicial review in matters pertaining to industrial adjudication and enforcing labour laws while enforcing labour welfare legislation is well settled. It has been held that unless the findings rendered by the

Tribunal/authority are perverse or its decision is based on irrelevant factors not germane for the purpose of arriving at a correct finding of fact or when relevant factors were not taken into consideration, would be cases where this Court will exercise its power of judicial review. Therefore, it has to be seen as to whether any of these parameters stand attracted in the impugned order so as to interfere with the order. The core question would be as to whether the second respondent had worked for more than 240 days. The Hon'ble Supreme Court in the case of Manager, Reserve Bank of India vs. S.Mani & Ors., (supra), considered the issue as to how the onus and burden of proof has to be considered. It was pointed out that initially the burden of proof was on the workman to show that he had completed 240 days of service and the onus of proof does not shift to employer nor is the burden of proof on the workman discharged, merely because employer fails to prove a defence or an alternative plea of abandonment of service.

10. In the instant case, the second respondent produced 30 documents, which are all records pertaining to the payment of salary. These records have not been disputed by the petitioner Management. Therefore, it is not a case as pointed out by the Hon'ble Supreme Court in the case of Manager, Reserve Bank of India vs. S.Mani & Ors., (supra), where the Hon'ble Supreme Court held on fact that the onus of proof had not shifted on the employer. However in the instant case, the records produced by the second respondent are records pertaining to her salary details and 30 documents have been produced. The Management did not seek to cross examine the second respondent on those documents rather those documents have been accepted. In such circumstances, the onus of proof would definitely shift on the Management to establish that those documents does not in any manner establish the continuous employment of the second respondent. In such circumstances, the first respondent authority was justified in coming to a conclusion that the Management did not discharge the onus of proof cast upon them in the light of the documents which were placed by the second respondent before the authority. Infact the counter statement filed by the Management was a bald denial while accepting the fact that the second respondent's services have been engaged in the Sales Depot. The provisions of the Shops and Establishment Act has been enacted to protect the interest of the workman from being exploited and to prevent unfair labour practice engaging a workman on daily wages continuously and by giving artificial breaks would prove that there is a need for the post. When the first respondent on facts was satisfied that the second respondent had completed more than 240 days of continuous employment, the relief granted to the second respondent was justified. The second respondent cannot be non-suited on the ground that there are service Rules framed by the petitioner Management and recruitment should be in accordance with the

service Rules. However, it is to be noted that the second respondent has not approached this Court to issue a Writ of Mandamus to regularise her services rather she went before the competent authority by invoking the provisions of the Tamil Nadu Shops and Establishment Act and prayed for reinstatement as a permanent employee. The authority adjudicated the case and rendered a factual finding that the second respondent has completed more than 240 days of continuous employment. Therefore, the order passed by the first respondent is a result of an adjudication and therefore, the second respondent cannot be non-suited by contending that the proper recruitment process was violated while engaging the services of the second respondent. Infact, the complaint of the second respondent before the authority was that she was being unfairly dealt with and retained as a daily wage earner for almost two decades.

11. Thus, in the absence of any perversity in the order passed by the first respondent, the same does not call for any interference. Accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

pbn

To

1.The Deputy Commissioner of Labour,
Office of the Commissioner of Labour,
Chennai - 600 006.

2.The Section Officer,
VR Section,
High Court, Madras.

[31/05/2016]

+1cc to Mr.N. Thiagarajan, Advocate, S.R.No.3773

+1cc to the Government Pleader, S.R.No.3721

+ 1 cc to Mr.V.S.Sivasundaram, Advocate Sr 3583 (17/3/16)

SKV(CO)
EU(28/01/2016)

W.P.No.21349 of 2003