

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.11.2016

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH

And

THE HON'BLE MR JUSTICE V.PARTHIBAN

W.A.Nos.370 & 371 of 2016

and

C.M.P.Nos.5395 and 5396 of 2016

Management,

Gestamp Sungwoo Hitech(Chennai) Pvt.Ltd.,

Survey No.488/2, Mannur Village,

Valarpuram Post,

Sriperumbudur Taluk-602 105,

Kanchipuram District

... Appellant in
both the Writ Appeals

Vs.

1.Government of Tamil Nadu,

rep.by its Secretary,

Labour and Employment Department,

Fort St.George,

Chennai-600 009

... 1st respondent in
both the W.As.

2.Joint Commissioner of Labour(Chennai),

O/o.Commissioner of Labour,

D.M.S.Compound, Teynampet,

Chennai-600 006

... 2nd respondent in
W.A.No.370 of 2016

3.Puthiya Jananayaga Thozhilalar Munnai,

Gestamp Sungwoo Hitech Employees Branch,

regn.No.43/TVR, No.110/63, N.S.K.Salai,

Kodambakkam, Chennai-600 034

...2nd Respondent in
W.A.No.371 of 2016
...3rd respondent in
W.A.No.370 of 2016

Writ Appeals preferred under Clause 15 of the Letters Patent against the order dated 12.01.2016 made in W.P.No.19138 of 2013 and 26553 of 2014.

WP.No.19138 of 2013 of 2014:Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus, Forbear the 3rd respondent from altering the service conditions of the members of the petitioner union whose names are given in the Annexure to the affidavit filed in support of the writ petition in any manner including discontinuance of service or transferring or failing to provide employment in any manner without getting permission under Section 33 of the Industrial Disputes Act 1947 in the Industrial Dispute raised by the petitioner which is pending conciliation before the 2nd respondent as dispute NO.A/2556/2013 regarding charter of demand and additional charter of demand and further direct the 2nd respondent to conciliate and effect settlement and if no settlement is forthcoming to submit failure report under Section 12(4) of the Industrial Dispute Act and inturn direct the 1st Respondent to refer the dispute for adjudication before the competent Industrial Adjudicator.

Prayer in WP.No.26553 of 2014: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the concerned records from the 1st respondent quash the G.O(D) No.370 Labour and Employment (A2) Department issued by the 1st respondnet dated 20.08.2014 and consequently direct the 1st respondnet to refer the demand item No.1 2 3 11 13A 13C 13D 13E 13F 13G 13H 14 15 16 17 18 19 20 and 21 in the dispute raised by the petitioner union dated 23.5.2013 and 03.07.2013 foradjudication before the competent Industrial Adjudicator.

For Appellant :Mr.AL.Somayaji,Sr.counsel for
Mr.C.K.Chandrasekhar in both WA's

For Respondents:Mr.P.S.Sivashanmugasundaram
Spl.G.P.for R1 and R2 in WA.370/16 &
R1 in WA.371/16
Mr.Balan Haridas for R3 in WA.370/16 &
R2 in WA.371/16

JUDGMENT

(Judgment of the Court was delivered by HULUVADI G.RAMESH,J)

These writ appeals, by the Management, Gestamp Sungwoo Hitech (Chennai) Pvt.Ltd., are directed against the order dated 12.01.2016, made in W.P.Nos.19138 of 2013 and 26553 of 2014, in and by which, the learned single Judge directed the first respondent/Government of Tamil Nadu to refer the matter to the competent Industrial forum and also directed the concerned Industrial forum to dispose of the matter within a period of three months thereafter and till such disposal, granted status

quo as prevalent at the time of passing of the interim order, dated 12.07.2013, made in M.P.No.1 of 2013 in W.P.No.19138 of 2013.

2. Heard the learned counsel for the parties for some time.

3. It appears that in connection with the service conditions of the employees of the appellant Management, the matter was taken up before the Joint Commissioner of Labour (Chennai), the second respondent herein. It is noted that the Conciliation ended in failure. The employees Union/writ petitioner wanted to get an adjudication before the Labour Court. In the meantime, they also sought for an order of interim direction.

4. The learned single Judge, while ordering for reference also directed the concerned Industrial forum to dispose of the matter within a period of three months from the reference and in the meanwhile, directed the parties to maintain status-quo, as prevalent at the time of passing of the interim order, dated 12.07.2013, made in M.P.No.1 of 2013 in W.P.No.19138 of 2013.

5. The learned counsel for the employees Union/writ petitioner submitted that pending Conciliation proceedings, 46 persons were terminated from service, without obtaining permission under Section 33-A of the Act and though it is open to the aggrieved persons to invoke Section 33-A of the Act, stating that it is not an effective alternate remedy in the light of the fact situation of the case, as it is the contention of the writ petitioner/employees union that the termination of 46 persons is not in accordance with Section 2(oo) of the Industrial Disputes Act, and accordingly, as a consequence, it is submitted that Section 33 of the Industrial Disputes Act would not be attracted. Therefore, the learned Single Judge, opining that the writ petitioner union need not invoke alternate remedy and also in the light of the subsequent development of passing of the G.O.(D).No.370, dated 20.08.2014, proceeded to pass an order in favour of the writ petitioner Union by way of directing the parties to maintain status-quo and also directing the Government to refer the demand for adjudication before the competent Industrial forum within a period of six weeks therefrom.

6. As far as the referring of the matter to the Industrial Tribunal is concerned, the learned single Judge having found that there is a prima facie case for the matter to be referred to the Industrial Tribunal or to the Labour Court, consequent to the failure of the Conciliation before the Labour Court, directed the Government to refer the dispute for adjudication before the Industrial forum and to that extent

there is no dispute by the parties.

7. The grievance of the appellant management is that in view of the judgment of the Hon'ble Supreme Court in Federal Bank Ltd., vs. Sagar Thomas & Others (Appeal (Civil) 106 of 2001, dated 26.9.2003, and further judgment of the Apex Court in the case of Binny Ltd., and Another vs. V.Sadasivan and Others, [(2005) 6 Supreme Court Cases 657] mandamus cannot be issued against a private company or private body and the writ petition cannot be maintained. It is submitted that the reasonings recorded by the learned Single Judge to protect the interest of the workmen, under the guise of exercising extraordinary original jurisdiction under Article 226 of the Constitution of India, is totally untenable.

8. We have sufficiently heard the learned counsel for the appellant and the learned counsel representing the respective respondents.

9. Through out, the apprehension expressed on the side of the workmen is that during the pendency of Conciliation, some of the persons have been terminated without any basis. The learned Single Judge, taking into consideration the fact situation, has taken such a decision to protect the interest of the workmen, and accordingly ordered to maintain status-quo and ordered to adjudicate the matter within three months. As such, exercising writ jurisdiction, and directing the Government to refer the matter to the Labour Court or Industrial Tribunal for adjudication and also issuing a time bound direction for disposal of the dispute cannot be faulted.

10. So far as the extending of interim order is concerned, what is being sought to be contended by the learned counsel for the appellant herein is under the guise of seeking reference of the matter, an interim order is passed, which is untenable. In this regard reliance has been placed to the decision rendered by this Court in W.A.No.161 of 1999, disposed of on 29.4.1999, by a Division Bench, in the case of Pharmaceutical Industries Ltd. and Sun Pharmaceutical Industries Staff Union and Others, wherein, this Court held that interim injunction sought therein against employer-company restraining it from shifting machinery or transferring employees could not be granted, as the so-called main prayer seems to have been made only with an idea to legitimise the otherwise untenable writ petition under Article 226 of the Constitution.

11. In Federal Bank Ltd., vs. Sagar Thomas and Others, the Hon'ble Supreme Court has held as follows:

"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in

certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to."

12. In another case in Binny Ltd. and Another vs. V.Sadasivan and Others [(2005) 6 Supreme Court Cases 657], the Hon'ble Supreme Court, referring to the writ remedy to a private party, has held as follows:

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than

the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol.30, p.682,

"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit." There cannot be any general definition of public authority or public action. The facts of each case decide the point.

"31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in State of U.P.v.Bridge and Roof Co.(India) Ltd. [(1996) 6 SCC 22]] and also in Kerala SEB v. Kurien E.Kalathil [(2006) 6 SCC 293]. In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.

13. The above ratio laid down is to the effect that if the terms of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226 of the Constitution of India.

14. In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd., vs. Ram Gopal Sharma and Others [(2002) 2 Supreme Court Cases 244], it is held that the proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said proviso cannot be taken away. It is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman. The Hon'ble supreme Court also held that where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval, obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision.

15. In the instant case, with regard to the maintainability of writ petition is concerned, to the risk of repetition, we would like to reiterate that the prayer for issuance of a direction to refer the dispute for adjudication before the Labour Court or Industrial Tribunal, is only against the authority concerned to exercise his power duly and on examining the materials placed before the authority, the said authority has to decide whether it is a fit case for reference or otherwise. The learned single Judge having examined in summary found that there is a prima facie case for reference of the matter before the Industrial Tribunal and accordingly directed the Government of Tamil Nadu to refer the matter to the Industrial Forum.

16. In furtherance thereof, in the penultimate portion of the order, on the grievance expressed by the Employees Union that 46 persons were terminated, the learned single Judge, in exercise of extraordinary jurisdiction under Article 226 of the

Constitution of India, directed to maintain status-quo and also directed that there should not be any termination till a decision is taken by the Industrial Tribunal.

17. We are aware of the fact that remedy is available to the victims/workmen, who have suffered any illegal retrenchment, under the proviso to Section 33(2) of the Industrial Disputes Act. It has to be seen the manner in which the action has been taken by the management and the protection available to the workmen as against such exploitation or against illegal act of termination or dismissal etc.

18. The apprehension expressed by the management is that under the guise of seeking for extension of reference to the Industrial Tribunal, further direction issued by the learned single Judge against a private company, is totally abuse of process of law and the writ petition cannot be maintained.

19. Though in this regard, in Federal Bank case, referred supra, it has been clearly mandated as to what are all the situations in which such a direction could be issued for compliance of mandatory provisions or the legal provisions that is one aspect. So far as injuncting a particular person through a writ of mandamus is purely a civil remedy, which according to the Management, has to be addressed before the Industrial forum, constituted for such purpose. In the circumstances, though when the learned single Judge has rightly ordered for adjudication of the dispute by the Industrial Forum, the extension of interim direction not to take any coercive action till the matter is adjudicated by the Labour Court/Industrial Tribunal, appears to be purely under necessity, in the factual matrix of the case.

20. As is evident from Section 33 of the I.D.Act and the decision of the Hon'ble Apex Court, in the case of Jaipur Jillah case, as noted above, if any adverse order is passed by the management, which would terminate the service of the petitioner, the writ petitions by individuals or by an association is totally void on the ground that statutory provision provides that unless such permission is accorded by the authority for terminating the services, by way of prior permission, the services of the employees cannot be terminated, and if done so, the further proviso also provides for payment of compensation under Section 17-B of the Industrial Disputes Act. Furthermore, though the apprehension expressed by the Management is genuine that the remedy cannot be extended in the fashion and manner in which the learned single Judge has expressed, however, on the reference, when the matter is taken up by the Labour Court/Industrial Tribunal, an application can be filed by the concerned association to issue necessary direction to the management, since that would be exercising a statutory right and

on such application being filed, the concerned Industrial Forum, being fact finding authority, could find out or adjudicate whether there is a prima facie case for extension of advance relief for injunction as is sought for by the association.

21. Although we are of the view that extension of protection not to take any coercive action is beyond jurisdiction, however, we hold that the said direction is issued only under necessity. It is needless to say that appropriate remedy is always available to the association or workmen to move the Labour Court for such an interim order or injunction as the case may be, which forum can very well pass such an order if prima facie case is made out.

22. With the above modification and clarification, the writ appeals are disposed of accordingly. Till the reference is made, the employer/Management shall not take any coercive steps. No costs. Connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. Government of Tamil Nadu,
rep.by its Secretary,
Labour and Employment Department,
Fort St.George,
Chennai-600 009

2. Joint Commissioner of Labour (Chennai),
O/o. Commissioner of Labour,
D.M.S.Compound, Teynampet,
Chennai-600 006

+1 cc to Government Pleader sr 69154

+2 ccs to Mr.C.K.Chandrasekar Advocate sr 68760

+1 cc to Mr.Balan Haridas Advocate sr 68714

W.A.Nos.370 & 371 of 2016

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