

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 18-11-2016

Orders Pronounced on : 15-12-2016

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.No.28351 of 2016

and

W.M.P.No.24474 of 2016

J.Gopal

... Petitioner

Vs.

1. Tamil Nadu Newsprint and Papers Limited,
Represented by its Deputy Managing Director,
No.67, Mount Road, Guindy, Chennai-600 032.
(Cause title of first respondent amended as per
order dated 03.10.2016 in W.M.P.No.29730 of 2016
in W.P.No.28351 of 2016)

2. The Deputy General Manager,
Tamil Nadu Newsprint and Papers Limited,
No.67, Mount Road, Guindy, Chennai-600 032.

3. The General Manager,
Tamil Nadu Newsprint and Papers Limited,
No.67, Mount Road,
Guindy, Chennai-600 032.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records in connection with the issue of the impugned order No.HR/Contract/15, dated 29.04.2015 and HR/Contract/16, dated 11.05.2016 of the second and third respondents respectively and quash the same in so far as the appointment is termed as contract is concerned and consequently direct the respondents to regularise the services of the petitioner in terms of the original order of appointment Reference No.HR/ESTT/15, dated 17.03.2015 with all attendant benefits.

For Petitioner : Mr.Ravi Paul
for M/s.Paul and Paul

For Respondents : Mr.Sanjay Mohan
for M/s.Shivakumar and Suresh

ORDER

The petitioner has filed the above Writ Petition praying for issuance of a Writ of Certiorarified Mandamus to call for the records in connection with the issue of the impugned order No.HR/Contract/15, dated 29.04.2015 and HR/Contract/16, dated 11.05.2016 of the second and third respondents respectively and quash the same in so far as the appointment termed as contract is concerned and consequently direct the respondents to regularise the services of the petitioner in terms of the original order of appointment Reference No.HR/ESTT/15, dated 17.03.2015, with all attendant benefits.

2. The case of the petitioner with the dates and events as stated in the affidavit filed in support of the Writ Petition is that the petitioner had completed 12th Standard during March 1989 and thereafter pursued Bachelor of Science in Presidency College and completed the same in July 1989 and obtained Second Class. Thereafter, he applied for Master of Science in the same College and finished the same in the month of July 1992 and obtained First Class. Subsequently, he had completed Master of Business Administration from Alagappa University (full-time) during August 1994 and obtained Second Class and the main subject in MBA is Sales/Marketing. While the petitioner was working in Sri Jaya Jothi Cements Ltd., Hyderabad as Regional Manager in the year 2014, he came to know about the vacancy for the post of Manager (Marketing) / Senior Manager (Marketing) in the advertisement issued by the respondents in the Indian Express on 12.11.2014. Based on the above mentioned advertisement, the petitioner had applied for the post of Manager (Marketing) / Senior Manager (Marketing) on 24.11.2014. Based on the above said application, he was called for an interview by the second respondent, by way of a letter, dated 08.12.2014 and the interview was scheduled on 23.12.2014 at 1.30 p.m. in the respondents' premises at No.67, Mount Road, Guindy, Chennai-32. In the said letter, the second respondent also requested the petitioner to bring all the original certificates/testimonials and photostat copies in proof of his age, qualification, community, experience and latest salary slip for verification. Accordingly, the petitioner attended the interview as scheduled by the respondents on 23.12.2014. After the above said interview, the petitioner was appointed as Senior Manager (Marketing)-Unit-II and posted at Delhi Branch by way of an order of appointment issued by the second respondent in Reference No.HR/ESTT/15, dated 17.03.2015.

3. It is further stated by the petitioner that the above said appointment is against the permanent vacancy and his probation period will be one year from the date of his joining and thereafter, he would be confirmed by the Company. The

petitioner was directed by the second respondent to undergo medical fitness from a Doctor who possesses MBBS with Post-Graduate Degree in General Medicine (M.D), by way of letter dated 17.03.2015. Accordingly, the petitioner went through medical tests on 28.03.2015 and obtained Medical Certificate from a qualified medical practitioner. Thereafter, the petitioner contacted the respondents to get the information regarding the next step to complete the medical formalities, but the respondents informed the petitioner that they are scrutinising the documents produced by the petitioner during the interview and found some issues and therefore, the petitioner was asked not to proceed further to complete the medical formalities. All of a sudden, the petitioner received a letter from the second respondent in Ref.No.HR/RECT/15, dated 07.04.2015, in which the second respondent pointed out that he was not in employment at the time of attending the interview, which is contrary to the information which he has provided in the application form, dated 15.12.2014 and also stated that the petitioner has not disclosed about his resignation and subsequent relieving order from his erstwhile company and further, he was requested by the second respondent to give the reasons for not disclosing about his non-employment at the time of attending the interview on 04.02.2015 and also about his resignation from his erstwhile Company which has been mentioned by the petitioner in the application form.

4. It is further stated that based on the above said letter of the second respondent, the petitioner gave explanation on 07.04.2015, in which the petitioner had clearly pointed out that he has resigned his job with M/s.Sri Jaya Jothi Cements Ltd., Hyderabad on 30.09.2014 and he was relieved on 29.12.2014, but he received the official communication only on 30.03.2015. It is the grievance of the petitioner that in the application provided by the second respondent, they did not ask the petitioner to provide specifically about his resignation or notice period and therefore, the question of providing an information about the resignation and the notice period had not arisen while the petitioner applied for the post. After the said explanation given by the petitioner, the second respondent issued a letter in Reference H.R./Contract/15, dated 29.04.2015 and appointed the petitioner as Senior Manager (Marketing) on contract basis for a period of 12 months. It is further stated that the second respondent unilaterally superseded the earlier order of appointment, dated 17.03.2015 and modified the same into contract basis, which is illegal. When the petitioner enquired about the contractual period mentioned in the letter of appointment by the second respondent, he was informed that it is only an initial arrangement and he was assured that he will be regularised after the period of one year, based on the petitioner's performance.

5. It is the further case of the petitioner that the second respondent pressurised the petitioner to join as Senior Manager (Marketing) on contract basis, and at that point of time, the petitioner did not have any option except to accept the same and he joined as Senior Manager (Marketing) on 13.05.2015 and was placed at Chennai for training. After completion of his training, the petitioner was transferred to Delhi in January 2016 and he discharged his duty upto the expectation of the respondents. The third respondent issued a letter, dated 11.05.2016, in which, he has extended the petitioner's service for three months from 13.05.2016 to 12.08.2016 and after the said period of three months, his engagement with the Company would automatically come to an end. The petitioner continued his work and did not receive any communication from the respondents till third week of July 2016. The petitioner came to know that the respondent-Company issued an advertisement for recruitment of Senior Manager (Marketing) in the month of June 2016 itself. That is the reason why his service was extended only for a period of three months and the Management decided to send him out on 12.08.2016 just to accommodate another person in the petitioner's place.

6. It is the further case of the petitioner that he made a representation to the Industrial Secretary, Government of Tamil Nadu and CM Grievance Cell on 22.07.2016. Thereafter, there was no favourable reply from the second respondent. Hence, he sent another representation on 08.08.2016 by Speed Post to the third respondent with a request to grant him a regular appointment as Senior Manager (Marketing), the post which he had been holding from April 2015 after proper selection. It is the further grievance of the petitioner that the respondents cannot unilaterally change the petitioner's appointment into contract basis without any valid reason, when he was appointed against the permanent vacancy. Hence, challenging the above said orders, dated 29.04.2015 and 11.05.2016, the petitioner has filed this Writ Petition, for the relief stated supra. 7. Before making his submissions on the factual aspects of the matter, since the respondents have raised the question of maintainability of the Writ Petition in the counter affidavit, learned counsel for the petitioner submitted that at first, he would address on the said issue. Learned counsel for the petitioner invited the attention of this Court to the counter affidavit filed by the respondents with regard to the maintainability of the Writ Petition, wherein it is stated that the respondent-Company is not a Government Company and it is only a public limited company registered under the Companies Act, and therefore, the Writ Petition is not maintainable as against the respondent-Company.

8. In the above context, learned counsel for the petitioner has drawn the attention of this Court to a decision of this

Court reported in CDJ 2008 MHC 1871 = 2008 (5) MLJ 200 (R.Anbazhagan, Deputy Manager (Mechanical), Tamil Nadu Newsprint and Papers Ltd. Vs. The State Information Commission and others) and submitted that in that case, the Writ Petition was filed against the respondent-Company (TNPL) and even in that case, the respondents have raised the issue with regard to maintainability of the Writ Petition stating that the respondent-Company is not a Government Company. This Court, after elaborate discussion and by adverting to the Memorandum and Articles of Association of TNPL, came to the conclusion that the TNPL is a public authority and hence, the Writ Petition is maintainable. Learned counsel for the petitioner further submitted that the respondents, having accepted the said decision of this Court and after acting upon it, the same has now reached a stage, where, it is not open for them to raise the question of maintainability of the present Writ Petition.

9. That apart, learned counsel for the petitioner submitted that the respondent-Company is amenable to Writ jurisdiction. In support of this contention, the learned counsel also invited the attention of this Court to Article 124(31) of the Articles of Association and submitted that the Governor of Tamil Nadu is having absolute power over the Company and its affairs. Learned counsel further contended that as per Article 97 of the Articles of Association, the State Government shall appoint part-time or full-time Chairman. As per Article 115(2) of the Articles of Association, in case of equality of votes, the Chairman shall have a casting vote in addition to his vote as a Director. Therefore, learned counsel for the petitioner submitted that the Government of Tamil Nadu is having absolute power over the control of the respondent-Company (TNPL) and that being so, out of nine subscribers to its Memorandum of Association, seven of them are employees of the Government service. He further submitted that out of the first 5 Directors of the Company, 4 were IAS Officers in the grade of Commissioner and Secretary to Government. Learned counsel for the petitioner therefore submitted that the Writ Petition is maintainable and the respondent-Company (TNPL) is amenable to Writ jurisdiction.

10. With regard to the factual aspects of the case, learned counsel for the petitioner submitted that the respondent-Company has issued advertisement in the Indian Express on 12.11.2014, based on which, the petitioner applied for the post of Manager (Marketing) / Senior Manager (Marketing) on 24.11.2014. The petitioner was called for an interview to be held on 23.12.2014. The petitioner was issued with an order of appointment by the second respondent, dated 17.03.2015. In the said offer of appointment, in Clause 21 therein, the petitioner was directed to report for duty and was instructed to bring all the documents specified therein. The petitioner accepted the offer of

appointment. Subsequently, on 07.04.2015, the petitioner has received a letter from the second respondent, a copy of which is enclosed in the typed set of papers filed along with the Writ Petition, stating that the petitioner was not in employment at the time of attending interview, which is contrary to the information which the petitioner provided in the application form, dated 15.12.2014. It is further stated in the said letter, dated 07.04.2015 that from the documents submitted by the petitioner, it was observed that the petitioner was not in employment with his previous employer at the time of attending the interview on 04.02.2015 and he got himself relieved from the services of his previous employer (M/s.Sree Jaya Jothi Ltd) on 29.12.2014 itself, but in the TNPL's application form submitted by the petitioner on 15.12.2014, under the column "Current Employment", the petitioner has stated that he was working with his previous employer, but failed to inform that he had already submitted resignation on 30.09.2014 to his previous employer. Hence, the second respondent requested the petitioner to give the reason for not disclosing about the petitioner's non-employment at the time of attending the interview on 04.02.2015 and about his resignation from his previous employer while submitting the details in the TNPL's application form on 15.12.2014.

11. It is the further submission of the learned counsel for the petitioner that, to the above letter, dated 07.04.2015, the petitioner gave an explanation stating that though he resigned his job with his previous employer on 30.09.2014 and was relieved on 29.12.2014, he received the official communication only on 30.03.2015. The petitioner further stated that in the application provided by the second respondent, they did not ask the petitioner to provide specifically about his resignation or notice period, and therefore, the question of providing an information about the resignation and the notice period did not arise when the petitioner applied for the post. Therefore, learned counsel for the petitioner submitted that for the above said reason, there was no occasion for the petitioner to disclose about his non-employment with his previous employer. However, the second respondent pressurised the petitioner to join duty as Senior Manager (Marketing) on contract basis by giving assurance that he will be regularised after one year based on his performance. Hence, the petitioner was left with no other alternative but to accept the employment and he joined duty as Senior Manager (Marketing) on contract basis, believing that his services would be regularised as assured by the respondents. Contrary to the above assurance, the respondents have issued advertisement for recruiting Senior Manager (Marketing) in the month of June 2016, and his services were extended for three months, just to accommodate another person in the place of the petitioner. In this regard, learned counsel for

the petitioner invited the attention of this Court to various judgments of the Supreme Court and this Court and submitted that if a contract or a clause of the contract is unconscionable, the same is void and therefore, the reason given for providing employment on contract basis, is not legally sustainable and hence, learned counsel for the petitioner prayed for quashing the impugned orders and to direct the respondents to regularise the services of the petitioner.

12. Countering the above submissions, learned counsel for the respondents, by filing detailed counter affidavit, submitted that the respondent-Company is not a Government Company. As per Section 2(45) of the Companies Act, 2013, which is equivalent to Section 617 of the Companies Act, 1956, the Government Company means a Company in which not less than 51% of the paid-up share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a Company which is a subsidiary Company of such a Government Company. Insofar as the present case is concerned, the Government of Tamil Nadu has only 35.32% share and therefore, learned counsel for the respondents submitted that it would not be a Government Company within the meaning of the Companies Act. Learned counsel for the respondents, by inviting attention of this Court to 36th Annual Report of the respondent-Company, submitted that the Government of Tamil Nadu is having 35.32% of shares and the remaining 64.68% shares are spread over among various financial companies, banks, mutual funds, investors and the public. Therefore, it would mean that the control of the Government is not exclusive or all pervasive.

13. In the above context, learned counsel for the respondents invited the attention of this Court to the judgment reported in 2002 (5) SCC 111 (Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology), wherein the Supreme Court held as follows:

"40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* (*Ajay Hasia Vs. Khalid Mujib Sehravardi* - 1981 (1) SCC 722 : 1981 SCC (L & S) 258) are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be -- whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the

other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

"98, We sum up our conclusions as under:

.....

(2) The tests laid down in Ajay Hasia case (Ajay Hasia Vs. Khalid Mujib Sehravardi - 1981 (1) SCC 722 : 1981 SCC (L & S) 258) are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the court of brooding presence of the Government or deep and pervasive control of the Government so as to hold it to be an instrumentality or agency of the State."

14. By relying upon the above judgment, learned counsel for the respondents submitted that in the instant case, the Government itself is having only share of 35.32%, and hence, the control of the Government is not exclusive or pervasive. Learned counsel for the respondents also invited the attention of this Court to the dictionary meaning of "pervasive" and submitted that the word "pervasive" means "spreading everywhere and to every corner". Consequently, it is just not control that is contemplated, but "deep and all pervasive control" and as a test to see whether or not Government is the real manager of the Company.

15. Learned counsel for the respondents further submitted that the Board of Directors governs the Company and the Managing Director can be appointed by the Government of Tamil Nadu as per Article 97 of the Articles of Association of the Company. But the Managing Director himself acts upon the decision of the Board. The Board comprises of Directors appointed by the Government of Tamil Nadu and independent Directors appointed by the Board of Directors. The appointment of these Directors are approved by the shareholders in the subsequent Annual General Meeting. The list of present Directors would indicate that 6 out of total 10 number of Directors in the Board, have been appointed under Article 99(c) of the Articles of Association as independent Directors and the appointments have been

subsequently approved by the shareholders in the Annual General Meeting. Such appointment is as per the provisions of Section 149(6) and (8) read with Schedule IV of the Companies Act, 2013. Independent Director had been defined in Section 149 of the Companies Act and it is to the effect that these persons shall be drawn from experienced group of people whose integrity is established and to have expertise in their specialised field. Learned counsel for the respondents further submitted that there are as many as six independent Directors in the Board that consists of 10 Directors. If it is accepted that the independent Directors when they are at full liberty to give decisions of their role in the Board Meetings, there is no exclusive or all pervasive control by the Government.

16. Learned counsel for the respondents made detailed submissions with regard to the role of Managing Director. The Managing Director is appointed by the Government of Tamil Nadu. The Board comprises of the Directors who are independent of the Government of Tamil Nadu. Therefore, while there is some degree of control by the Government of Tamil Nadu, such control is not all pervasive ruling out control by others including members of the public, the Board of Directors or the shareholders of the Company. So far as the role of the Governor of Tamil Nadu is concerned, the Governor has powers vested in him under Article 124(31) of the Articles of Association and such powers are not compulsory to be utilised or exercised always and only discretion is vested with the Governor to exercise this right. The Governor of Tamil Nadu has not even once exercised this power under Article 124(31). Learned counsel for the respondents further submitted that the issues involved in the Writ petition have to be decided on the available facts and also on the basis of what is being done or has been done. At the time of incorporation of the Company, the Government of Tamil Nadu had 49% share-holding and this has since been reduced to 35.32%. Even the respondent-Company itself has indicated that it is not a Government Company, but only a Government of Tamil Nadu Enterprise. Therefore, learned counsel for the respondents submitted that the respondent-Company is not amenable to Writ jurisdiction.

17. With regard to the submission made by the learned counsel for the petitioner relying upon the decision of this Court reported in CDJ 2008 MHC 1871 = 2008 (5) MLJ 200 (cited supra), learned counsel for the respondents submitted that the said judgment was delivered based on the provisions of the Right to Information Act. Under Section 2(h) of the Right to Information Act, the definition of "public authority" includes an authority that is controlled by the Government or substantially funded by the Government. Such control need not be absolute control or complete control or all pervasive

control. So long as there is control by the Government however small such control may be, the same is sufficient for the applicability of the Right to Information Act. So far as the respondent-Company is concerned, the Government has 35.32% shares and the Government of Tamil Nadu has substantially financed the Company. The Right to Information Act operates in a different level and therefore, the said judgment of this Court cannot be made applicable to the facts of the present case.

18. Learned counsel for the respondents relied on a decision of this Court reported in MANU/TN/0015/2013 (TNPL Annl Ambedkar Tholilalar Sangham (registered under Trade Union Act, bearing Registration No.1107/TRY) Vs. The Secretary to Government of Tamil Nadu, Industries Department-cum-Chairman) (in W.P.No.10209 of 2012, dated 08.01.2013) and submitted that in the said case, this Court held that the respondent-Company (TNPL) is not a Government Company and hence, the Writ Petition is not maintainable. Therefore, learned counsel for the respondents submitted that the respondent-Company is not amenable to Writ jurisdiction and hence, the Writ Petition is liable to be dismissed.

19. With regard to the factual aspects of the case, it is submitted by the learned counsel for the respondents that the respondent-Company had issued advertisement in the Indian Express on 12.11.2014, based on which, the petitioner applied for the post of Manager (Marketing) / Senior Manager (Marketing) on 24.11.2014. The petitioner was one of the short-listed candidates to be called for the interview by the respondent-TNPL, vide e-mail dated 08.12.2014, followed by the letter dated 08.12.2014, informing the petitioner to attend the interview for the post of Manager (Marketing) / Senior Manager (Marketing) on 23.12.2014 in the respondent-TNPL Corporate Office and he has also been asked to return the enclosed Application Form duly filled in, to the Personnel Department on or before 17.12.2014 without fail. Accordingly, the petitioner had submitted the duly filled in Application Form, dated 15.12.2014. In the said Application Form, he had mentioned that he was working in Sree Jayajothi Cements and had not disclosed the fact that he had resigned from the said Company and he was serving his notice period. The interview was originally scheduled to be held on 23.12.2014, but it was postponed and subsequently held on 04.02.2015. Even in the interview, the petitioner did not disclose that he had left the services of his erstwhile Company. The petitioner was issued with an order of appointment by the second respondent, dated 17.03.2015, which was cancelled by order dated 29.04.2015. There is no dispute that the cancellation was never challenged till the present Writ Petition, which has been filed nearly one year and three months after the cancellation, practically, on the last date of

expiration of the extended contract period. Having accepted the cancellation of offer of appointment that never took off because the petitioner did not report for duty based on the offer of appointment, dated 17.03.2015 and thereafter, having accepted the contractual employment not once but twice, it would not be possible for the petitioner now to claim permanent employment based upon the order dated 17.03.2015, the cancellation of which the petitioner accepted and acted upon. Learned counsel for the respondents further submitted that long before the advertisement itself came out on 12.11.2014, the petitioner had already submitted a letter of resignation, dated 30.09.2014 to his erstwhile employer and was serving the notice period post-resignation. Even before he applied on 15.12.2014 for employment with the respondent-Company, his resignation had been accepted by his erstwhile employer, vide letter dated 22.10.2014. Exactly 14 days after his application dated 15.12.2014, he ceased to be in the services of his previous employer. But the tenor of his application dated 15.12.2014 sought to convey the impression as if he was in employment. That apart, even on the date of interview on 04.02.2015, he did not disclose that there had been a changed situation brought about on account of his no longer being in employment with the previous employer. The respondent-Company came to know that the petitioner was no longer in employment with his previous employer only on 26.03.2015, when the petitioner forwarded his resignation acceptance letter to the respondents by E-mail. In fact, the petitioner has also accepted his mistake, by letter dated 07.04.2015. Thus, the petitioner has suppressed about his tendering resignation to his previous employer in the application as well as in the particulars furnished by him on the date of interview with the respondent-Company, and that is the reason why his employment was cancelled and he was given employment on contract basis, by the impugned order. Therefore, learned counsel for the respondents submitted that the petitioner is not entitled to the relief sought for in the Writ Petition and hence, he prayed for dismissal of the Writ Petition.

20. Keeping in mind the above submissions made on either side, I have carefully considered the same and perused the materials available on record.

21. Though very many contentions have been raised by learned counsel on either side, following questions emerge for consideration in this Writ Petition and this Court is of the view that answering the same would suffice as substantial pronouncement on the subject:

(a) Whether the respondent-Company is amenable to Writ jurisdiction ? And

(b) Whether a case has been made out to give direction to regularise the services of the petitioner in the respondent-Company ?

22. It is the main submission of the learned counsel for the respondents that the respondent-Company is not a Government Company and the Government of Tamil Nadu is having only 35.32% of shares and the remaining 64.68% shares are spread over among various financial companies, banks mutual funds, investors and the public. The public alone have shares equal to 21.23% , and therefore, the control of the Government is not exclusive or all pervasive. Hence, the respondent-Company is not a Government Company and as such, it is not amenable to Writ jurisdiction. In this regard, learned counsel for the respondents made detailed submissions by inviting the attention of this Court to the provisions of the Memorandum and Articles of Association of the respondent-Company as well as the provisions of the Companies Act. In order to substantiate the contention that the respondent-Company is not a Government Company, since it has got only 35.32% shares, the learned counsel for the respondents has also made detailed submissions by adverting to the percentage of the shares held by various financial companies, banks, mutual funds, investors and the public. Though in my considered opinion, the Government is holding only 35.32% shares in the respondent-Company, in the instant case, from Article 124(31) of the Articles of Association of the respondent-Company, it could be seen that the Governor of Tamil Nadu is having complete control over the respondent-Company. The said Article 124(31) reads as follows:

"Article 124(31): Notwithstanding anything contained in any of these articles, the Governor may, from time to time, issue such policy directions or instructions as he may consider necessary in regard to the finance and the conduct of the business and affairs of the company or Directors thereof and in like manner, may vary and annul any such directions or instructions. The Directors shall duly comply with and give immediate effect to directions or instructions so issued."

23. On a reading of above said Article 124(31), as observed earlier, the Governor of Tamil Nadu is having complete control over the respondent-Company to issue policy directions or instructions as he may consider necessary in regard to the finance and the conduct of the business and affairs of the Company or Directors thereof. Therefore, it is the Governor of Tamil Nadu who has complete control over the respondent-Company (TNPL). But it is the submission of the learned counsel for the respondents that though the Governor of Tamil Nadu has powers

vested in him under Article 124(31) of the Articles of Association, such powers are not compulsory to be utilised or exercised always and only discretion is vested in the Governor to exercise his right, and therefore, it cannot be said that the Governor of Tamil Nadu is having complete control over the respondent-Company and that, not even once, the Governor had exercised this power under Article 124(31). But, in my considered opinion, the extent of power vested on the Governor under Article 124(31) of the Articles of Association, is significant and he has extensive and complete control over the respondent-Company, and therefore, it is not significant as to whether he has exercised his control or not, over the respondent-Company. Therefore, when the Governor has power to the extent of varying or giving directions to the Board of Directors, it has to be construed that the power of the Governor is absolute. Therefore, the submission made by the learned counsel for the respondents, totally falls to the ground by virtue of Article 124(31) of the Articles of Association

24. Moreover, with regard to the amenability of the respondent-Company, to the Writ jurisdiction and maintainability of the Writ Petition, the learned counsel for the petitioner relied on the judgment of the Supreme Court, reported in 2013 (8) SCC 345 (Balmer Lawrie and Co. Ltd. Vs. Partha Sarathi Sen Roy), wherein, the Supreme Court observed as under:

"28. In order to determine whether an authority is amenable to writ jurisdiction except in the case of habeas corpus or quo warranto, it must be examined, whether the company/corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the public; whether the entire share capital of the company is held by the Government; whether its administration is in the hands of a Board of Directors appointed by the Government; and even if the Board of Directors has been appointed by the Government; whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to government functions, or whether a department of the Government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the Government. In the event that the Government provides financial support to a company, but does not retain

any control/watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not, therefore, be merely regulatory."

25. So far as the present case is concerned, as per Article 124(31) of the Articles of Association of the respondent-Company, the Governor may, from time to time, issue such policy directions or instructions as he may consider necessary in regard to the finance and the conduct of the business and affairs of the Company or Directors thereof and in like manner, may vary and annul any such directions or instructions. Hence, it is clear that the State Government, financially, functionally and administratively, is dominating and having control over the Company. Hence, for these reasons and in view of the above judgment of the Supreme Court, I am of the opinion that the respondent-Company is amenable to Writ jurisdiction and hence, the Writ Petition is maintainable. Hence, the judgment(s) relied on by the learned counsel for the respondents on this score, cannot be made applicable to the facts of the present case.

26. So far as the factual aspects of the case are concerned, the question that has to be considered is as to whether, after issuance of advertisement for filling up the post of Senior Manager (Marketing) / Manager (Marketing), for the permanent vacancy, the action of the respondent-Company in offering the appointment to the petitioner on contract basis, is legally sustainable or not. According to the respondents, the Advertisement/Notification for the post of Manager (Marketing) / Senior Manager (Marketing) was issued on 12.11.2014 and the petitioner applied for the said post on 24.11.2014. Even prior to the said Advertisement/Notification, the petitioner has submitted his resignation to his erstwhile employer, namely M/s.Sri Jaya Jothi Cements Limited, Hyderabad. But, in the Application Form submitted to the respondent-Company, he has suppressed about his resignation with the erstwhile employer. In other words, according to the respondent-Company, the petitioner has not disclosed in his Application Form about the fact that he was not in employment with his erstwhile employer on the date of submitting his Application Form to the respondent-Company on 15.12.2014. Even on the date of interview on 04.02.2015, the petitioner has not submitted any details with regard to his resignation submitted to the previous employer. Since the petitioner has suppressed about his non-employment with his previous employer in the Application Form submitted by him to the respondent-Company, he was offered employment in the respondent-Company only on contract basis, which he has also accepted, and therefore, the learned counsel for the respondent-

Company submitted that having accepted the offer of employment, the petitioner cannot now turn back and say that he should be given permanent employment, and he cannot ask for quashing of the impugned orders.

27. But it is the reply of the learned counsel for the petitioner that though the petitioner has submitted his resignation on 30.09.2014 itself, he was actually relieved only on 29.12.2014. Therefore, on the date of submitting the Application Form, namely on 15.12.2014, no occasion has arisen for the petitioner to mention about his non-employment with his erstwhile employer. Moreover, the petitioner was relieved from his erstwhile employment only on 29.12.2014. However, the resignation of the petitioner was accepted and relieving order was communicated to the petitioner only on 30.03.2015, which is much later from the date of interview held on 04.02.2015. Therefore, on the date of interview also, no necessity has arisen for the petitioner to intimate about the details of his relieving of the duties from his previous employer.

28. It is the further submission of the learned counsel for the petitioner that in the Application Form provided by the respondent-Company, they did not ask the petitioner to provide information specifically about his resignation or notice period, and therefore, the question of providing an information about the resignation with the erstwhile employer and the notice period, had not arisen while the petitioner applied for the post. In this regard, the petitioner has also produced the communication, dated 30.03.2015, his Application Form, dated 15.12.2014, etc., in the typed set of papers filed along with the Writ Petition, for perusal of this Court, from which, it could be inferred that the petitioner has received communication about the acceptance of his resignation only on 30.03.2015, which is evident from the Service Certificate, dated 30.03.2015 issued by the petitioner's erstwhile employer.

29. It is the specific case of the petitioner that he was offered employment only on contract basis by assuring him that his services would be regularised based on his performance. Though the Notification was issued for the permanent post, since the respondent-Company made allegation against the petitioner that he has suppressed about his previous employment, having no other alternative, the petitioner has accepted the contractual employment with the respondent-Company, hoping that his services would be regularised. But, in the meantime, the respondent-Company issued fresh Notification for recruiting the post of Senior Manager (Marketing). Further, according to the petitioner, the employment on contract basis is unconscionable and the same is void, since the Notification was earlier issued only for the permanent vacancy while he applied.

30. In support of his submissions, learned counsel for the petitioner relied on a judgment of the Supreme Court reported in 1986 (3) SCC 156 = 1986 (2) AISLJ 320 (Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and another), wherein the Supreme Court held as follows:

"89. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A Schroeder Music Publishing Co. Ltd. Vs. Macaulay (formerly Instone) (1974 (1) WLR 1308) (supra) however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In Kedar Nath Motani and others Vs. Prahlad Rai and others, (1960 (1) SCR 861) reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and

unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

31. Learned counsel for the petitioner also relied on a decision of the Supreme Court reported in 2013 (8) SCC 345 (cited supra) (Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy), wherein the Supreme Court observed as follows:

"30. Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, that has been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad item as regards the weaker party may therefore, be entirely absent. Thus, the existence of equal bargaining power between parties becomes largely an illusion. The State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-a-vis its employees in order to terminate the services of its permanent employees in accordance with such terms and conditions. (Vide Central Inland Water Transport Corpn. Ltd. Vs. Brojo Nath Ganguly - 1986 (3) SCC 156 : 1986 SCC (L & S) 429, DTC Vs. Mazdoor Congress, - 1991 Supp (1) SCC 600 : 1991 SCC (L & S) 1213, LIC Vs. Consumer Education and Research Centre - 1995 (5)

SCC 482, K.C.Sharma Vs. Delhi Stock Exchange - 2005
(4) SCC 4 : 2005 SCC (L & S) 496 and Punjab National
Bank Vs. Astamija Dash - 2008 (14) SCC 370 : 2009 (1)
SCC (L & S) 673)."

32. The above said observations of the Supreme Court in the said judgment reported in 2013 (8) SCC 345 (cited supra), shows that when there is no equality of bargaining between the contractual parties, such a condition or provision in the contract becomes unconscionable, unfair and unreasonable. So far as the present case is concerned, on the date of offering the contract, the petitioner was in the position of accepting the offer, having been left with no other alternative.

33. It is seen that the respondent-Company was accusing the petitioner that he has suppressed about his non-employment on the date of submission of his Application Form on 15.12.2014, which accusation the petitioner is disputing. In this regard, the petitioner has given his explanation on 07.04.2015 with tangible proof that he has received the communication about the acceptance of his resignation by the previous employer only on 30.03.2015. Therefore, no occasion has arisen for the petitioner to state about his non-employment in the Application Form submitted by him to the respondent-Company and finally left with no other alternative, the petitioner has accepted the offer for the appointment on contractual basis, hoping that his services would be regularised as assured by the respondent-Company. In my considered opinion, having notified in the Advertisement for permanent vacancy, in contra to the said Notification, the respondents cannot offer the employment on contract basis, by putting a pressure on the petitioner to accept the same, who has no equal bargaining power with the respondent-Company, and hence, the act of the respondent-Company in making the petitioner to accept the offer of appointment on contract basis, is not justified and legally not sustainable. Hence, this Court is of the opinion that the petitioner has made out a case to give direction to regularise his services in the respondent-Company. Therefore, the petitioner has rightly challenged the unconscionable and arbitrary decision of the respondent-Company in placing the petitioner under a contract, which was forced on him, as he does not have equal bargaining power with the respondent-Company. Moreover, the respondent-Company has not produced any Rule or other condition according to which, the details furnished by the petitioner could be termed as 'suppression' and in any event, the alleged suppression would only arise, if there is a specific requirement for disclosure which was not complied with by the petitioner. It is further to be noticed that on the date when the petitioner applied for the post on 15.12.2014, he was actually in service with his erstwhile employer, and there is no column in the Application

Form to provide any other information about the resignation. Moreover, during the interview, the petitioner was not asked any question about the current status of his employment. This being the factual position, the question of concealing the fact or information about his previous employment, would not arise.

34. Therefore, for all the above stated reasons, the impugned orders are not legally sustainable insofar as the appointment termed as contract, is concerned. Hence, the petitioner is entitled for the relief prayed for. Consequently, the impugned orders are liable to be quashed to the extent indicated above. Accordingly, the impugned orders are quashed, insofar as the appointment termed as contract, is concerned. The Writ Petition is allowed. The respondents are directed to regularise the services of the petitioner in terms of the original order of appointment in Reference No.HR/ESTT/15, dated 17.03.2015, with all attendant benefits. No costs. Consequently, W.M.P. is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cs

To

1. The Deputy Managing Director,
Tamil Nadu Newsprint and Papers Limited,
No.67, Mount Road,
Guindy, Chennai-600 032.
2. The Deputy General Manager,
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+1cc to M/s.Paul and Paul, Advocate, S.R.No.73627

+1cc to Mr.Shivakumar , Advocate, S.R.No.73407

W.P.No.28351 of 2016

SS(CO)
CA(09/01/2017)