

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2017

CORAM

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

W.P.No.38187 of 2003
W.P.M.P.No.46355 of 2003

The Management,
A.3099 Tamilnadu State Transport
Workers Co-operative Stores Ltd.,
27, Bypass Road,
Pasumpon Nagar,
Madurai
Rep by Mr.SelvarajPetitioner

Vs.

1. The Deputy Commissioner of Labour,
(Appellate Authority under Tamilnadu
Shops and Establishment Act),
Madurai.
2. S.Ramalakshmi.Respondents

Prayer:- Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the order of the first respondent in any TNSE Appeal No.23/02 dated 05.11.2002 and quash the same.

For Petitioner : Mrs.Thenmozhi Shiva Perumal

For Respondents

For R1 : Mr.M.Elumalai
Government Advocate

For R2 Mrs.A.L.Ganthimathi

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O R D E R

The prayer sought for in this writ petition is for a Writ of Certiorari to call for the records of the order of the first respondent in TNSE Appeal No.23/02 dated 05.11.2002 and quash the same.

2. The necessary facts which are required to be noticed for disposal of this writ petition are as follows :-

The second respondent had been appointed as Saleswoman at the petitioner's society store on 01.06.1999. She was paid daily wages of Rs.55 per day. The second respondent with that capacity had been working for some years and during the year 2001, the petitioner-Society has issued show cause notice on 18.11.2001, stating that the second respondent had not been appointed by sponsoring her name through employment exchange and therefore such appointments are irregular and illegal appointments and therefore why the second respondent should not be removed from service and accordingly, the showcase was sought for within a period of seven days from the date of such notice. Pursuant to the said show cause notice, it seems that the second respondent had given her reply, however, without satisfying the same the petitioner-Society on 10.12.2001 passed an order of removal of service against the second respondent.

3. Aggrieved over the said order of removal of service, the second respondent had approached the Appellate Authority under the Tamil Nadu Shops and Establishment Act (The Deputy Commissioner of Labour, Madurai) and her appeal was numbered in case number TNSE.No.23 of 2002. In the said appeal, the first respondent authority after having considered the rival claims made by the parties, has ultimately concluded that the removal of service of the second respondent was unlawful and therefore, the said order of removal of service was set aside and a direction was given to the petitioner-Society to reinstate the second respondent within a period of 30 days with continuity of services however, without back wages. Aggrieved over the order passed by the first respondent vide order dated 05.11.2002, the petitioner-Society has filed this writ petition with aforesaid prayer.

4. I have heard Mrs.Thenmozhi Sivaperumal, learned counsel appearing for the petitioner and Mrs.A.L.Ganthimathi, learned counsel appearing for the second respondent.

5. The learned counsel appearing for the petitioner submits that the petitioner-Society is governed under the Tamilnadu Co-operative Societies Act, 1983 in short "the Act" and the rules called the Tamilnadu Co-operative Societies Rules in short "the Rules", made there under. Under Rule 149, every society depending upon their volume of business and nature of business adopted a special bye-laws covering the service condition of the employees and such special bye-laws shall interalia prescribe the cadre strength and classification of various category of post and qualification required thereon, method of recruitment, scale of pay and allowances, conditions of probation, duties and responsibility, leave of various types admissible and the penalty that may be imposed etc.

6. Therefore, every society has to have their own bye-laws under which service conditions of the employees of the society are to be governed. In this context, the learned counsel appearing for the petitioner would submit that any appointment to be made in the petitioner-Society, must have been made only by calling for application or sponsorship of candidates from the Employment Exchange concerned, of course, after evaluating interse merits between the candidates sponsored so, by the Employment Exchange, and each of the post, after ensuring that whether the candidate would be appointed, is fulfilling the educational and other qualification, such appointment can be made.

7. In this regard, the learned counsel appearing for the petitioner would submit that, in the case of the second respondent, admittedly, she has not been sponsored by the Employment Exchange and more over the post of Saleswoman, wherein she was appointed, comes under the clerical category for which, separate educational qualification of co-operative training is essential without which no one can be employed in the society under the clerical post. The learned counsel for the petitioner would submit that since the appointment was made inadvertently, without getting the name of the second respondent from the Employment Exchange and without verifying the educational qualification, the petitioner-Society wanted to take action against the second respondent by removing her from service. Accordingly, the show cause notice was issued to her and also she replied to the said show cause notice. However not satisfying with the explanation or reply given by the second respondent, the petitioner-Society passed an order of removal of service on 10.12.2001, which is not an order out of disciplinary action but it is only an order of removal simplicitor.

8. The learned counsel for the petitioner would also submit that the law is well settled in this regard that, there can be no back door entry in public employment and since the second respondent had not been sponsored by the Employment Exchange, which is the recognized method of appointment of the employees in the co-operative society as contemplated under Rule 149 of the rules, the petitioner-Society cannot continue to employ, any employees who had entered into the service through back door method and therefore action had been taken by the petitioner against the second respondent, of course after giving show cause notice and getting her views also.

9. The learned counsel appearing for the petitioner would also submit that, as against the order passed by the Society, if the second respondent is aggrieved, she could have filed a Revision before the Revisional Authority under Section 153 of the Act. Instead, she has invoked the provisions of the

Tamilnadu Shops and Establishment Act and before such forum the dispute of the co-operative employees covered under the Co-operative Societies Act as well as the Rules made there under, cannot be resolved and therefore on that ground also the impugned order passed by the first respondent authority is liable to be interfered.

10. Per contra, Mrs.A.L.Ganthimathi, learned counsel appearing for the second respondent would submit that the post, where the second respondent appointed, was saleswoman post, for which though no specific qualification has been made by the petitioner-Society in their bye-law, it is common parlance that the said saleswomen are appointed with the qualification of S.S.L.C. Here the case in hand, the petitioner has passed +2 (Higher Secondary Course) and also she has completed Diploma in Co-operative Training. With these qualification, the second respondent also had registered the said qualification in the concerned district Employment Exchange. When the vacancies for the post of Saleswoman arose at the petitioner-Society, the second respondent was called for interview and it is not known to the second respondent as to whether any other candidates were considered for the appointment for the said post along with the second respondent.

11. At any rate, since the second respondent is having the necessary qualification, and in fact, more qualification i.e., +2 and Diploma in Co-operative Training, she had been appointed by the petitioner's society as Saleswoman on 01.06.1999. Since the appointment, the second respondent had been continuously working for some years up to 2001 and thereafter all of a sudden, a show cause notice was issued, as claimed by the petitioner-Society, stating that her appointment was not made pursuant to the sponsorship from the Employment Exchange. The second respondent had given her reply stating that after appointment, when she was continuously working, she in fact asked for the petitioner-Society to absorb her permanently and the said request had been kept pending with the petitioner-Society for some years. When that being so, pursuant to the said show cause notice, the petitioner-Society had passed an order of removal on 10.12.2001 on the two reasons that the communal rotation to be followed in the petitioner-Society had not been followed and the name of the second respondent had not been sponsored by the Employment Exchange. On these reasons, since the second respondent had been removed from service, and since the petitioner-Society is running only a store, which comes as a shop within the meaning of Tamilnadu Shops and Establishment Act and the procedure contemplated in that Act also, since had not been followed by the petitioner before passing of the order of removal, the second respondent had approached the said authority by filing an appeal for assailing the order of removal from service.

12. It is further submitted by the learned counsel for the second respondent that the first respondent after having considered the relative merits of the case and the claim made by the second respondent had ultimately concluded that the order of removal is unsustainable and accordingly, the same was set aside and the second respondent was directed to be reinstated with continuity of service. Therefore, the learned counsel appearing for the second respondent would submit that, there is no infirmity in the order passed by the first respondent as admittedly, the procedure contemplated under the Tamilnadu Shops and Establishment Act has also not been followed and therefore, the first respondent had every right to interfere with the order of removal passed by the petitioner-Society.

13. I have considered the rival submissions made by both sides and perused the materials placed before this Court.

14. The case as projected by the petitioner-Society is that, the second respondent was not appointed pursuant to the sponsorship of the candidates named by the Employment Exchange. More over the second respondent did not have the minimum qualification to hold the post of Saleswoman which is under the clerical cadre and also the petitioner-Society without following the communal rotation had appointed the second respondent as Saleswoman and therefore on these grounds, the continuation of the second respondent as Saleswoman in the petitioner-Society was considered to be unlawful and unjustifiable and therefore show cause notice was issued and after giving opportunity the order of removal was passed.

15. Insofar as the said grounds are concerned, the second respondent admittedly is having a qualification of +2 and Diploma in Co-operative Training and those qualification had already been registered in the Employment Exchange. More over, since the petitioner-Society is running a store, where the prime job to be undertaken is the sales of the goods and materials and therefore the job of Saleswoman is inevitable job. Therefore, in that context, the petitioner-Society after having considered the qualification of the second respondent had appointed her as Saleswoman on 01.06.1999. From the date of appointment till the date of removal, the second respondent had been continuously working with the petitioner-Society and in this regard, it is the claim of the second respondent that she had been working more than 600 days up to 30.01.2001. The said claim made by the second respondent had not been disputed, as from the date of appointment, she had been continuously working in the petitioner-Society.

16. Though it was submitted by the learned counsel appearing for the petitioner that, as per the bye-law made pursuant to Rule 149 of the Rules, the cadre strength of employees, qualification of each of the job and cadre has to be

fixed, based on which, since the Saleswoman post is a clerical cadre, she should have completed the Diploma in Co-operative Training and without such qualification, no one can be appointed in the Co-operative Society and therefore, the very qualification of the second respondent also is not satisfying with the requirement of the petitioner-Society is concerned, the said argument cannot be accepted, for the simple reason that, the petitioner's post is called Saleswoman and therefore for the said post, what has been the educational qualification has not been specifically spelt out either in the affidavit filed in this writ petition or any other documents filed before this Court. Assuming that the post of Saleswoman is a clerical cadre for which the Diploma in Co-operative Training is one of the essential qualification, even the said qualification has been fulfilled by the second respondent as she has completed +2 and also completed the Diploma in Co-operative Training and the said qualifications had also been registered in the Employment Exchange.

17. Insofar as the other grounds namely, the non following of the communal rotation in the Society is concerned, the Society has not filed any documents before this Court, as to what is the cadre strength of the Society and in each of the cadre strength how many workers working at the time the second respondent was appointed and whether the said communal rotation had been strictly followed by the Society, had not been filed or proved before this Court. In the absence of any materials to that effect, this Court can not go into that aspect as to whether the communal rotation has been strictly followed in the petitioner-Society by making appointment to the situations of the Society.

18. Though these grounds had been raised in this writ petition, the order of dismissal of service only discloses that the second respondent had been removed for two reasons only ie., no communal reservation was followed and her name was not sponsored by the Employment Exchange. Since no other material has been produced before this Court in respect of the other appointments having been made in the petitioner-Society, whether these two conditions had been strictly followed, it cannot be construed that the petitioner-Society only for these two reasons had taken a decision to dispense with the service of the second respondent.

19. Though against the said order of removal of service, the second respondent could have approached the Revisional Authority under the provisions of Tamilnadu Co-operative Societies Act, the second respondent had approached the authority under the Tamil Nadu Shops and Establishment Act as the petitioner's store comes within the meaning of shop under the said Act and therefore Section 141 of the said Act would be

applicable to the case of the petitioner's store. Therefore on that score, the first respondent authority had entertained the appeal filed by the second respondent and ultimately found that even the provisions of Shops and Establishment Act had not complied with before passing the order of removal by the petitioner-Society and therefore, on that ground also the first respondent has passed the impugned order directing reinstatement of the second respondent.

20. Even independently, if we consider the case of the second respondent under the provisions of the Tamilnadu Shops and Establishment Act, the petitioner-Society's case cannot be accepted as there are no merits to show that these grounds are sustainable to take action against the second respondent to remove her from service, after having extracted work from her for more than three years, where admittedly she had been continuously working for more than 600 days. The law is well settled in this regard that if an appointment is made illegally, the same cannot be cured at any point of time. However, if any irregular appointment is made even in the public service and the person who had been appointed so, had the necessary qualification even at the time of entering into the service, the same can be regularized. In other words illegal appointments are incurable, whereas, the irregular appointments are only curable. Therefore at any point of time the said irregularity can be cured i.e., the appointment without sponsoring the name from the Employment Exchange.

21. Therefore for the said reason i.e., non sponsoring the name through Employment Exchange and non following the communal rotation, the drastic action of removing the second respondent from service cannot be permissible and therefore on that score this Court is of the considered view that the impugned order passed by the first respondent can be sustainable, independently, apart from the reasons given in the said order. For all these reasons, this Court is not inclined to accept the case of the petitioner and accordingly, the writ petition is liable to be dismissed.

22. In the result, following orders are passed in this writ petition :-

(i) The impugned order of the first respondent dated 05.11.2002 is sustainable. Hence, the writ petition is liable to be dismissed and accordingly is dismissed.

(ii) Since the second respondent had been out of service for all these years she would not be entitled to claim any back wages on her reinstatement. The order for reinstatement of the first respondent shall be complied with by the petitioner-Society, within a period of two months from the date of receipt of a copy of this Order.

23. With theses observations, the writ petition is dismissed. Consequently, connected miscellaneous petition is also closed. No costs.

s/d-
Assistant Registrar(CS-III)

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Sub-Assistant Registrar

rts

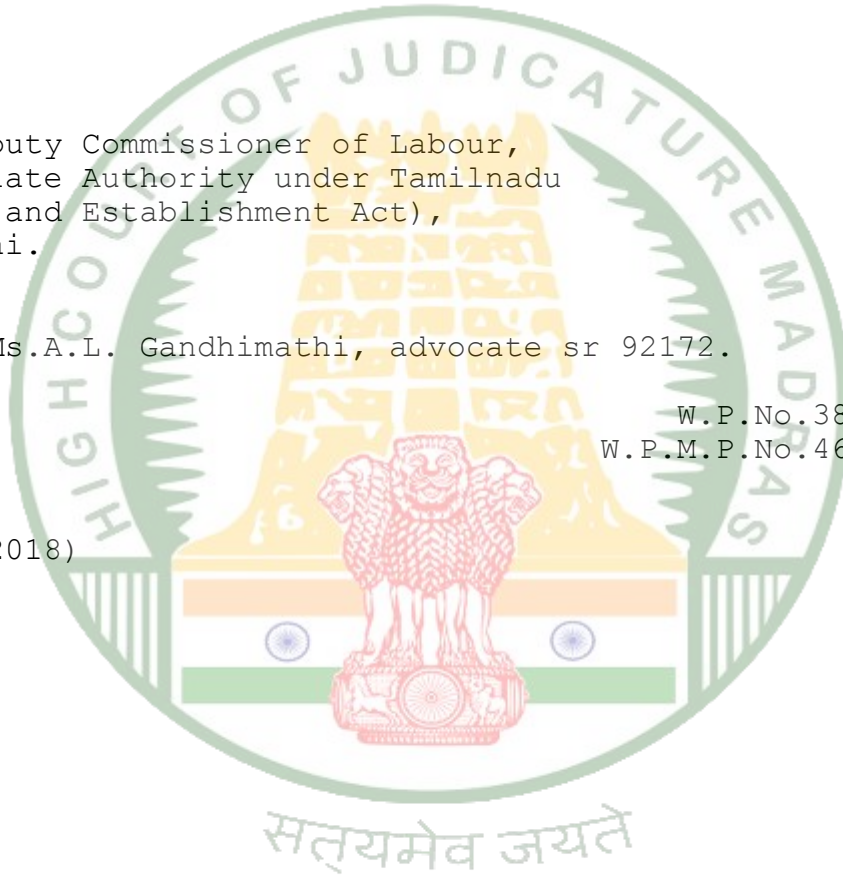
To

1. The Deputy Commissioner of Labour,
(Appellate Authority under Tamilnadu
Shops and Establishment Act),
Madurai.

+1 CC to Ms.A.L. Gandhimathi, advocate sr 92172.

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MG(CO)
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