



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.03.2017

CORAM

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P. (MD) No.362 of 2017
& WMP (MD) 273 & 274 of 2017

K.Raju

... Petitioner

-vs-

1.The Presiding Officer,
Labour Court,
Trichy.

2.The Management,
Tamil Nadu State,
Transport Corporation,
Madurai Unit - IV Ltd.,
Dindigul.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records relating to the impugned award in I.D.No.146 of 2002 dated 02.09.2016 passed by the 1st respondent and quash the same as illegal.

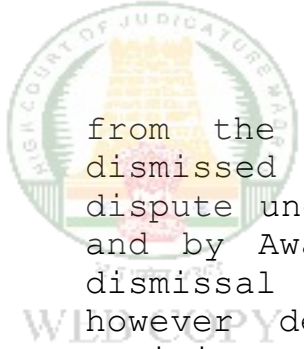
For Petitioner : Mr.Mohamed Imran
For M/s.Ajmal Associates

For R2 : Mr.A.P.Muthupandian

O R D E R

This petition has been filed, seeking to quash the impugned order dated 02.09.2016 passed by the 1st respondent in I.D.No.146 of 2002, by which, the Labour Court, while setting aside the order of dismissal, refused to grant backwages on the ground that the petitioner has not proved that he was not in gainful employment during the period of non employment.

2. The petitioner was initially appointed as Conductor on 24.09.1994 on daily wage basis; that since a sum of Rs.9/- was found excess in his bag, he was charge sheeted; that he was placed under suspension and that a charge memo was also issued. According to the petitioner, an enquiry was conducted in violation of principles of natural justice; that after receiving explanation



from the petitioner for the 2nd show cause notice, he was dismissed from service on 05.03.2001. The petitioner raised a dispute under the provisions of the Industrial Disputes Act, 1947 and by Award dated 02.09.2016, the Labour Court set aside the dismissal order by holding that the charges were not proved, but however denied to grant backwages, on the ground that the petitioner has not proved the fact that he was not in gainful employment.

3. Admittedly, the petitioner attained superannuation on 31.03.2016 and he could not be reinstated. Even though no counter has been filed, learned counsel for the 2nd respondent would contend that serious charges have been levelled against the petitioner and that it is the duty cast upon the petitioner to establish that he was not gainfully employed during the period of non employment.

4. It is seen that there is no writ petition filed by the Management. In Paragraph No.13 of the Award, the Labour Court has held that the petitioner has got to establish that he was not gainfully employment, which, in the considered opinion of this Court is far fetched and cannot be accepted. The Hon'ble Supreme Court in the case of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others**, reported in **(2013) 10 SCC 324**, has been pleased to hold as under:

"38.3 Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments."

5. From the above, it is clear that the burden of proof lies on the employer to prove the factum of gainful employment by the employee through oral and documentary evidence and not otherwise. Without doing so, shifting the same to the petitioner cannot be accepted. Therefore, the Award of the Labour Court, regarding



fixing of onus on the petitioner is contrary to the principles laid down by the Hon'ble Supreme Court in the case, referred to supra and hence, the said finding alone is liable to be set aside.

6. In the result, this Writ Petition is allowed and the finding of the Labour Court to the extent that the petitioner has to establish that he was not gainfully employed alone is set aside with the direction to the 2nd respondent to extend all the monetary benefits due to the petitioner and he shall be paid backwages from the date of dismissal till the date of retirement, viz. 31.03.2016 and the said amount shall be paid in twelve instalments together with all benefits.

7. Before parting with the judgment, this Court makes it clear that this order replaces/modifies the award of the Labour Court and in case, the Management is not going to implement the award within a period of 45 days from the date of receipt of a copy of this order, it is open to the workmen to make a complaint under Section 29 of the Industrial Disputes Act, 1947. Once the complaint is received, the Government will have to scrutinize the factual aspects and in case, the award is not complied with, it shall sanction prosecution against the persons who are falling under Section 32 of the Industrial Disputes Act, 1947 and bring the issue to a logical end. The Government shall also take into account the principles laid down in the decision of the Apex Court in the case of **Rajkumar Gupta vs. Lt. Governor, Delhi reported in 1997 (1) LLJ 994**. Once the prosecution is launched, the appropriate criminal court is expected to take up the matter and it shall proceed with the matter on a day-to-day basis without adjourning the matter beyond seven working days at any point of time.

8.No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

/True copy/

Sub Assistant Registrar

To:

1.The Presiding Officer,
Labour Court, Trichy.

2.The Management,
Tamil Nadu State,
Transport Corporation,
Madurai Unit - IV Ltd.,
Dindigul.



+1 cc to Mr.AJMAL ASSOCIATES , Advocate in SR.No. 12157

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