

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.04.2018

Pronounced on : 27.04.2018

CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA

AND

THE HON'BLE MRS. JUSTICE S.RAMATHILAGAM

Writ Appeal No.436 of 2014
& M.P.No.1 of 2014

The Madhur Farm,
Rep. by its Deputy Director (T & V),
Mathur, Karaikal ... Appellant /
Petitioner

versus

1. The Presiding Officer, Labour Court, Karaikal
2. Madhur Farm Thozilalargal Union, Rep. by its Secy.,
No.14 Thennur, Thirunallar, Karaikal
3. K.Senthilkumar
4. P.Rajamanickam
5. S.Kamalraj
6. M.balamurugan
7. T.Gopalakrishnan
8. K.Sundar
9. P.Vijayakumar
10. K.Azhagirisamy
11. A.Simonraj
12. S.John Kennedy
13. K.Ramesh
14. V.Derech
15. A.Anthoni Abel
16. A.John Kilbon
17. S.Fathima Mary
18. A.Jayamary
19. V.Alosanai Mary
20. S.Susila Mary
21. N.Thethirumary
22. G.Mathalan Mary
23. A.Annamary
24. R.Essu Papa
25. K.Lakshmi
26. A.Andoniyammal
27. K.Padmavathy
28. B.Adaikalamary
29. S.Jelinmary
30. P.Dhavamary
31. S.Sammanasemary
32. B.Deisy Rany

... Respondents / workmen

Writ Appeal filed under Clause 15 of the Letters Patent, against the order, dated 09.04.2013 passed in Writ Petition No.35379 of 2003.

WP.NO.35379 of 2003.

Writ Petitions under Article 226 of the Constitution of India for the issuance of a writ of Certiorari calling for the records relating to the impugned order dated 24.01.2003 passed by the 1st Respondent court in ID.NO. 9/01 On the file of the 1st Respondent court and quash the same.

For Appellant : Mr. J.Kumaran,
Govt. Advocate (Puducherry)
For Respondents : Mr. N.G.R.Prasad, for,
M/s. Row & Reddy, for R-2 to R-32.

J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

The award passed by the Labour Court, in I.D.No.9 of 2001, holding that the denial of employment to the 30 employees (Respondents R-2 to R-32) whose names are mentioned in the First Schedule to the petition is not proper and directing the Management to reinstate all the 30 employees with back-wages and attendant benefit is under challenge in Writ Petition No.35379 of 2003 by the Management.

2. The said writ petition was dismissed by the order, dated 09.04.2013. Challenging the dismissal, the writ appeal has been filed by the Management.
Brief facts:-

3. The Madhur Farm is involved in the production of seeds and growing of plants which includes, rice varieties, cotton, coconut and plantain tress. It was started in the year 1966 and it is under the control of Agricultural Department, Government of Puducherry. The farm is spread over to 40 acres having seed farm, research farm and agricultural training school.

3.1. The services of 30 workmen were engaged by the Madhur Farm. The workers who are engaged continuously were placed in the seniority list on the basis of the date of entry into service and later, they will be absorbed in the vacancies, which will be arising in the Agricultural Department. When one such seniority list was published in the year 1994, the names of the 10 workmen were left out. The representations made, expressing grievance over the omission of names of 10 workmen were not fruitful. Therefore, those workers who were denied employment raised a dispute on 20.04.1999 before Labour Officer, Karaikal.

3.2. The Management contested the claim and contended that the workers were engaged as seasonal workers on need basis and that they cannot be regularized. The Management failed to produce the records, i.e., attendance registers, payslips and other relevant documents. Pending dispute, as the Management continued to engage the services of third parties from outside, the workmen approached the Labour Court, in I.D.No.9 of 2001, contending that the denial of employment to the workmen is illegal.

3.3. The main contentions of the workmen are that: (a) the members have put in several years of service ranging over a period of two years to sixteen years of service; (b) the termination of their services without any notice is bad; (c) the Management ought to have regularized the services of the workmen; (d) the action of the management in resorting to engagement of contract labour is a retrogress step and it is contrary to the decisions of the supreme Court reported in 1985-II-LLJ 4 (M/s. Sukhadeo Vishwanath Garaje v. M/s.Food Corporation of India) and in 1986 (1) SCC 639 (Sureinder Singh and another v. Engineer-in-Chief, CPWD and others) and 2001 (1) LLJ 710 (Gujarat Agricultural University v. Rathod Labhu Bechar and others); (e) the decision of the Management is contrary to Sections 25-F, 25-G and 25-N of the Industrial Disputes Act.

3.4. The Assistant Director of the Madhur Farm, who was examined as R.W.1 admitted in his evidence that all the persons (30) mentioned in the First Schedule to the petition had worked in the farm from the years 1975, 1980, 1992, and 1993. R.W.1 further admitted that they have the Muster Roll from the year 1990.

3.5. The Labour Court took note of the fact that P.W.2, who was the co-worker of the petitioner's association alone, has been made permanent and the remaining persons have been left out without regularization. Though the permanent workers were paid a sum of Rs.82/- per day and those who were not regular workers were paid only a sum of Rs.22/- per day.

3.6. The Labour Court found that the denial of employment to the thirty employees (the respondents in this writ petition) was not proper and that the claim of those persons for reinstatement with backwages from 15.04.1999 for regularization of service and other attendant benefit is fair and proper. These findings of the Labour Court has been confirmed by the learned Single Judge in the writ petition with a direction to implement the award of the Labour Court, dated 24.01.2003, within a period of one month from the date of receipt of a copy of the order.

4. The main contentions raised by the learned counsel appearing for the appellant / Management are that: (a) the burden of proof of 240 days of continuous engagement of the

workmen by the Management is not on the appellant / Management, but it is only on the part of the workmen; (b) the 240 days of continuous engagement would not by itself confer any right to seek regularization; (c) the work itself is seasonal one and the engagement of the workmen was only depending upon the season; (d) Section 25-F of the Industrial disputes Act would not apply to the facts of the case; (e) majority of the respondents would have become ineligible for regularization on account of subsequent events like death, over-aging, joining in the services of other establishment, etc., On these grounds, the writ appeal is sought to be allowed by the appellant / Management.

4.1. In view of the rival contentions raised, the main point to be considered is whether there is a proof to show that the employees had been working continuously for a period of 240 days in the relevant year and even if it is proved that they had worked for 240 days, that would give a right for the workmen to claim regularization.

4.2. From the facts placed and evidence adduced and admissions made in the evidence of the management would go to show that the workmen herein had been working for years together but in the name of daily wage employees. The following are the vital admissions made:

1. Prior to 1999, workers were being directly recruited for work in the farm: only from the year 1999 contract system was introduced.
2. The department published seniority list continuously in the years 1968, 1974, 1992, 1994, 1998, and 2000. Muster roll is maintained by the management regularly. In the muster roll for workers, permanent workers have been paid daily wage of Rs.82/- and for the remaining workers, it was Rs.22/-.
3. Pay roll is also maintained by the department and it is in their control.
4. There were 186 names in the seniority list that were published in the year 1994 and among those persons, Panneerselvam, Vincent, Ulaganathan, Nagarajan, Jeevanandham, Rajangam, Tamilselvam and Elizabeth have been made permanent.

4.3. From the facts established through evidence, it is clear that the petitioners might have been recruited directly, their muster roll and pay roll are being maintained and it is under the control of the management; that there had been a seniority list maintained by the Management and that they are shown as daily wage workers only to avoid payment of Rs.82/- which are being paid to regular workers and these employees are paid only a sum of

Rs.22/- per day for years together. Therefore, the question appears to be whether the Management is guilty of unfair labour practices in declining payment of legitimate wages to the employees and whether the management under the government itself, can be part of the play in which the rights of workmen are violated.

5. The main issue raised by both side is with regard to burden of proof regarding continuous employment of workmen for a period of 240 days in a relevant year. The management contends that the burden is on the workmen but the workmen contended vice versa.

5.1. The learned Government Advocate relied upon decision in 2002 (3) SCC 25 in order to support the proposition that the burden of proof is not on the management to show that the claimant did not work for 240 days in the relevant year and the relevant observation reads as under:

"the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days : 8 : (RC) in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside".

5.2. The learned Government Advocate appearing for the appellant relied upon the decision reported in (2002) 3 SCC 25 (Range Forest Officer v. S.T.Hadimani) and contended that the burden was not on the Management to show that the workmen did not work continuously for a period of 240 days and the burden is on the part of the workmen to do that.

5.3. In paragraph 3 of the said order, it has been held as follows:-

"3. In our opinion the Tribunal was not right in placing the onus on the Management without first determining on the

basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

6. Contending that the workmen did not offer any proof regarding the continuous engagement of workmen for a period of 240 days and therefore, the order of the Labour Court and the learned Single Judge of this Court, placing the burden of proof on the part of the Management is liable to be set-aside, the management justifies the non-engagement of workmen.

7. On the other hand, the learned counsel appearing for the respondents 2 to 32 / Workmen contended that the decision relied upon by the appellant has been watered down by the later judgments of the Hon'ble Supreme Court reported in (2006) 1 SCC 106 (R.M.Yellatti v. Asst. Executive Engineer) and (2007) 4 SCC 94 (Sriram Industrial Enterprises Ltd., v. Mahak Singh and others) and as per those decisions, the workmen are entitled to permanent employment and other benefits. The relevant observations in those cases are extracted here-under for convenient reference:-

(2006) 1 SCC 106 (referred to supra):-

"17. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere

affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case."

(2007) 4 SCC 94 (referred to supra):-

"Having correctly interpreted the provisions of Section 6 N of the U.P. Act, the High Court rightly drew an adverse presumption for non-production of the Attendance Registers and the Muster Rolls for the years 1991 onwards. The best evidence having been withheld, the High Court was entitled to draw such adverse inference....."

These two decisions relied on the side of the workers are suited to the facts of this case. The Management is the custodian of records. The workers, who are working on the agricultural field, are not supplied with order of appointment. Mostly they are unlettered. The nature of the work is such that the workers cannot be expected to have/maintain any records. It is the Management who would have been maintaining attendance register and wage register. Those records if produced would show, whether the workmen had been continuously engaged for 240 days in a year. In the absence of any explanation for non-production of records, rightly the Court can draw adverse inference.

8. The next contention raised by the learned counsel appearing for appellant / Management is that, even assuming that the workmen had been employed for a continued period of 240 days, the workmen are not entitled to regularization and therefore, the claim of the workmen cannot be accepted.

9. Contending that regularization is not a matter of right the management relies upon the decision reported in 2008 (2) SCC 552

Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya vs. United Trades Congress and another wherein the relevant observation reads as under:

"15. The High Court has relied upon a decision of this Court in Mahendra L. Jain and

Others v. Indore Development Authority and Others
[(2005) 1 SCC 639]. Therein it is stated:

"19. The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation.

9.1. This contention is answered by the Full Bench decision of the Hon'ble Supreme Court reported in 1985 (2) SCC 136 (Workmen v. Food Corporation of India) where-under, it has been held that the termination of employment, which is against the provisions of the Industrial Disputes Act, would be illegal. The relevant observations reads as under:-

"... No employer since the introduction of the I.D. Act, 1947 and contrary to its Certified Standing Orders as statutorily required to be drawn up under the Industrial Employment(Standing Orders) Act, 1946 can dispense with the service of any workman without complying with the law in force. Any termination of service contrary to the provisions of the Standing Orders and the provisions of the I.D. Act, 1947 would be void. It is not necessary to call in aid precedents to substantiate this too obvious and well-established proposition. Then workmen working under an employer are told that they have ceased to be the workmen of that employer, and have become workmen of another employer namely, the contractor in this case, in legal parlance such an act of the first employer constitutes discharge, termination of service or retrenchment by whatsoever name called and a fresh employment

by another employer namely, the contractor. If the termination of service by the first employer is contrary to the well-established legal position, the effect of the employment by the second employer is wholly irrelevant. No attempt was made to justify the termination of service of the afore-mentioned workers of the Corporation by the subtle device of introducing a contractor so as to bring about a cessation of contract of employment between the workmen and the Corporation and a fresh contract of employment between the workmen and the contractor. If what was intended to be done was retrenchment, ex facie the action is contrary to the provisions of Sec. 25F of the I.D. Act, 1947. Viewed from either angle, the action of introducing so as to displace the contract of service between the Corporation and the workmen would be illegal and invalid and ab initio void and such action would not alter, charge or have any effect on the status of the afore-mentioned 464 workmen who had become the workmen of the Corporation."

9.2. Further, it is relevant to point out that the Apex Court, in the case of Chief Conservator of Forest & anr. v. Jagannath Maruti MANU/SC/0750/1996 : (1996) 2 SCC 293, 40 workmen were kept casuals for long years by the Forest Department. The Apex Court has observed that burden of proof cannot be placed on workmen in such cases as workmen cannot reasonably discharge such burden.

10. It is the duty of this Court to understand the phraseology used by the Hon'ble Supreme Court, while using an adjective reasonably before the phrase discharge such burden, what is the implication of the word "reasonably".

10.1. In the case of daily waged workmen, the Court cannot expect either an order of appointment or an order of termination in writing. Even for the wages received there would not be any record. It is only the Management, who is expected to maintain Nominal Muster Roll, Wage Register, Attendance Register, etc., When the management is in possession and control of documents, what is the nature and extent of proof one can expect from the workmen is reflected in the adjective reasonably.

11. No doubt, mere affidavit by the workmen may be self-serving statement, which cannot be completely relied upon. But, in this case, the employee has chosen to enter into the witness box and has made themselves available for

cross examination and produced the available documents. But the Management has not chosen to produce any documents, excepting Muster Roll dated 08.01.1998 and yet another document filed is relating to workers being appointed on contract basis for the sake of convenience. These two documents would establish the case of the workmen that the Management has indulged in adopting unfair labour practices and therefore, the claim of the workmen is fair and just.

12. It is also relevant to point out that the provisions of the Indian Evidence Act do not apply to the proceedings under Section 10 of the Industrial Disputes Act. Strictly speaking, the burden of proof as spoken to in the Evidence Act, would not apply to the enquiry under the Industrial Disputes Act. However, by application of the broad general principles, it can be said that the burden would be on the workmen only to the extent of the reasonable degree to which he will be able to produce the records. In other words, the nature and extent of proof required from the workmen would depend upon the nature of job, duration of employment, work culture in the establishment and other attendant circumstances.

13. Under the given set of facts and circumstances, reasonableness would not permit any Court to expect the workmen to prove anything beyond that. Therefore, the award of the Labour Court and the order of the learned Single Judge are justified in giving a finding that the workmen / employees / petitioners have proved the continuous employment for a period of 240 days. Even otherwise the evidence adduced on the side of the Management itself would go to show that the workmen had been employed for years together regularly and continuously and the contention that they did not work for period of 240 days is false even to the knowledge of the management. The management has gone to the extent of drawing up of seniority list. The service of the contractor were sought to be introduced only to deprive the legitimate claim of regularization by the workmen concerned who had been working for years together.

14. Pointing out the admission made by the Management that it has chosen to engage the services of the contractor and that it is not permissible under the Act, the learned counsel for the workmen relied upon the decision reported in (1985) 2 SCC 136 (referred to supra) where-under the practice of introducing the contract system that would have the effect of affecting the rights of the workmen has been deprecated and the relevant observation reads as under:-

"The submission that it was open to the Corporation to engage a contractor for handling of food grains may be true or legally acceptable; the question, however, is whether once some workmen became the workmen of the Corporation as here in before discussed, was it open to the Corporation to induct a contractor and treat its workmen as workmen of the contractor. The answer is in the negative, for the reasons here in before discussed. The agony consequent upon such submission may be unmasked- While the trend is in the direction of abolition of contract labor, this public sector undertaking appears to be completely oblivious to the trend and the pace-setter as enacted by the Parliament in the Contract Labor (Regulation and Abolition) Act, 1970. An assertion in the Statement of Objects and Reasons accompanying the Bill, which was enacted into the law, may help the Corporation in freeing itself from the traditional master-servant relationship and help it in becoming an ideal employer where exploitation in any form is wholly eschewed. The statement reads as under:

' The system of employment of contract labor lends itself to various abuses. The question of its abolition has been under the consideration of government for a long time. In the Second Five Year Plan, the Planning Commission made certain recommendations, namely, undertaking of studies to ascertain the extent of the problem of contract labor, progressive abolition of system and improvement of service, conditions of contract labor where the abolition was not possible."

सत्यमेव जयते

The Act was enacted with a view to abolishing wherever possible or practicable, the employment of contract labour. The proposed Bill aimed at abolition of contract labor in respect of such categories as may be notified. The Corporation attempted by its action to reverse that trend which does no credit to it. We say no more save and except saying that where the law helps, such anti labour practices must be thwarted or nipped in the bud."

15. In the very same decision, the issue as to what relief the workmen are entitled to in case of the discontinuance of employment by the Management has been considered. It has been held that the workmen (of the Food Corporation of the India, who had become the workmen of the Corporation) shall be entitled to all the rights, liabilities, obligations and duties as are prescribed for the workmen of the Corporation.

16. From the admission made by the Assistant Director of Agriculture of Mathur Farm (R.W.1), wherein he would state that prior to 1999 workers were being directly recruited and only from 1999 contract system was introduced would go to show that the petitioners herein should have been regular employees recruited properly but shown in the casual labourers list only in order to deprive salary which should be payable to the regular employees. Needless to point out that permanent employees are paid Rs.82/- per day and casual labourers are paid Rs.22/- per day. Only to get unjust enrichment at the cost and sweat of labourers the management has taken the contention that the workmen did not work continuously for a period of 240 days and that they were not regularized employees. It is relevant to point out that the management did not produce the terms and conditions of appointment procedure followed for recruitment and terms of employment under which the petitioners entered into service and other connected contemporaneous document. The seniority list published by the management has a column which speaks about number of years of service and not number of days of service. These workmen are entitled to all their rights, privileges, duties and liabilities as are applicable to the regular employees from the date of the Judgment of the Labour Court. The management by their conduct and the method of treatment of workmen have made the workmen to believe that they are the workmen of the management. The legitimate claim of the workmen cannot be declined after such long years of service. The management miserably failed in proving that the workmen are not the workmen of the management.

17. So far as the claim for backwages are concerned there is no proof to show that the workmen were not gainfully employed during the period of which they have been disengaged by the management therefore, the claim for backwages cannot be permitted.

18. The award passed by the Labour Court and the judgment of the learned Single Judge of this Court are confirmed except with regard to claim for backwages. Therefore, the writ appeal is liable to be dismissed and it is dismissed accordingly to the extent indicated above. No costs. Consequently, the connected MP is closed.

Sd/-
Assistant Registrar(CS viii)

//True Copy//

Sub Assistant Registrar

srk

To

1.The Presiding Officer, Labour Court, Karaikal

2.The Commissioner of Labour,
Labour Department government of Pudhucherry,
Pondicherry 605001.

3.The Director of Agriculture,
government of Pudhucherry,
Pondicherry .

+1cc to M/s.Row and Reddy , Advocate SR.No. 32572
+1 CC TO GOVERNMENT PLEADER SR.NO. 32608

W.A.No.436 of 2014
& M.P.No.1 of 2014

ASK(05/10/2018)

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