

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.1595 of 2018

R.Narayanan

... 2nd Respondent/Appellants

Vs.

1.The Management of
Sivaraman & Co.
Rep. by its Managing Partner
N.Sivaraman
Petrol Bunk II
Nageswaran North Street
Kumbakonam 612 001
Thanjavur District

... Petitioner/1st Respondents

2.The Presiding Officer
Labour Court
Cuddalore

.... 1st Respondent/2nd Respondent

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent
against the order of the writ court dated 08.03.2010 made in
W.P. No.9544 of 2000.

WP.9544/2000:

Petition filed under Article 226 of the Constitution of India it is prayed that this Honourable court may be pleased to issue a Writ of Certiorari calling for the records of the first respondent in C.P.No.88/93 and quash the Award dated 17.04.2000 and pass such further or other orders as this Honourable court may deem fit and proper in the circumstances of the case and render justice.

For Appellant : Mr.M.V.Venkataseshan

For 1st Respondent : Mr.G.Jeremiah

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Challenge in this writ appeal is to the order of the writ court, dated 08.03.2010 made in W.P. No.9544 of 2010, by which, the writ court, set aside the order of the Labour Court, Cuddalore dated 17.04.2010 made in C.P. No.88 of 1993.

2. Short facts leading to the filing of the writ appeal are that the appellant was employed as a clerk in the first respondent management; that his last drawn monthly salary was Rs.810/-; that from 01.03.1992, the first respondent-management refused to give employment to the appellant; that the first respondent-management did not neither suspend nor remove the appellant from service; that the appellant was ready and willing to serve in the first respondent-management; that the appellant had not resigned his job; that the first respondent-management did not pay leave salary to the appellant for the months of January and February, 1992; that the first respondent-management has not paid the leave salary of the appellant for 12 days in 1991; that the appellant is entitled to receive monthly salary of Rs.810/- from January, 1992 to February 1994 and also leave salary of Rs.324/- for the year 1992 and that therefore, the appellant filed a claim petition in C.P. No.88 of 1993 before the Labour Court, Cuddalore, for a direction to the first respondent-management, to pay a sum of Rs.21,384/- towards the wages under Section 33(c)(2) of the Industrial Disputes Act, 1947.

3. Before the Labour Court, Cuddalore, it was the case of the first respondent-management that the petitioner was serving as clerk in first respondent's petrol bunk. He was in-charge of sale of the petrol. On 09.01.1992, when the management checked the accounts, a sum of Rs.585.20 alone was available as against a sum of Rs.3,787.90 being the sale proceeds of the day and thus there was a shortage of Rs.3,202.70. When the enquiry conducted on the same day, revealed that the appellant did not write accounts for the sale of 1500 litres of petrol and thus a sum of Rs.25,815/- was misappropriated. When the stock verification was done, it was found that the appellant had not accounted for sale of 6100 litres of petrol, valued at Rs.1,04,981/-. Even after 09.01.1992, the appellant served and received salary for January and February Months. From 02.03.1992 to 07.03.1992, the appellant went on leave and the same was extended up to 18.03.1992 by the appellant. A charge memo dated 18.03.1992 was served on the appellant on 20.03.1992.

4. On 25.03.1992, a detailed charge sheet cum notice of enquiry dated 25.03.1992 was issued to the appellant. Enquiry was fixed on 25.03.1992. In the charge memo, it was stated that the appellant did not attend work from 21.03.1992. In the

attendance register it has been shown that the petitioner did not attend the work from 20.03.1992. On 01.06.1992, a notice of enquiry was issued calling upon the appellant to appear for an enquiry on 17.06.1992. The appellant did not attend the enquiry on 17.06.1992 and hence the same was adjourned to 21.07.1992. On that day also, the appellant did not attend the enquiry, instead he filed a suit in O.S. No.554 of 1992 on the file of District Munsif Court, Kumbakonam and that the same was intimated through a letter by the appellant. The suit was dismissed. The enquiry was again posted to 28.02.1994. On that day also, the appellant did not attend and hence he was set ex-parte and the Enquiry Officer made his enquiry report dated 04.03.1994.

5. On 07.03.1994, a second show cause notice was issued to the appellant. As there was no reply, on 29.03.1994, he was removed from service. From 21.03.1992 to 29.03.1994, the appellant did not attend the duty. The amount claimed by the appellant is not sustainable. It is the appellant, who has to pay a sum of Rs.1,33,998.70. If any amount is payable to the appellant, the same to be deducted from the amount payable by him.

6. Before the Labour Court, Cuddalore, the appellant has deposed evidence as MW1 and marked five documents as P.1 to P.5. On the side of the employer, one Thiru.Kasiraman, has deposed as DW1 and marked as many as thirty six documents as M.1 to M.36.

7. The Labour Court, Cuddalore, upon hearing the arguments and after perusing the documents, allowed the claim petition in part and directed the employer to pay a sum of Rs.19,764/- being wages and leave salary to the petitioner under Section 33(c)(2) of the Industrial Disputes Act, 1947.

8. Being aggrieved by the order of the Labour Court, Cuddalore, first respondent-management, filed W.P.No.9544 of 2000, contending inter alia that the order of the Labour Court, Cuddalore is beyond its jurisdiction under Section 33(c)(2) and erroneous in law; that the Labour Court failed to consider that only when a workman reports for duty, he will be entitled to wages irrespective of whether or not any work was allotted to him; that the Labour Court failed to consider that when admittedly the first respondent-management had not prevented the appellant from reporting for duty, though the employer was not willing to allot any work, there was no need for the appellant to seek an order from the first respondent-management to allot him work and on that basis, make a claim for wages for the period he has not reported for duty; that the Labour court failed to consider that, as the appellant handed over charge to one Namasivayam on 29.02.1992 and as no other work could be allotted to him, the first respondent-management cannot be compelled to allot work to the appellant; that the Labour court

erred in holding that merely because the relationship of master and servant continued between the first respondent management and the appellant, the first respondent management was bound to pay him wages for the period after 23.03.1992 till the date of termination of his employment and that the labour court failed to consider that it was not the case of the appellant that he was not permitted to report for duty but his claim was that when he reported for duty, he was not allotted work. In that situation, the appellant cannot insist on the first respondent-management allotting work, whenever he reported for duty.

9. Before the writ court, the appellant has filed a counter affidavit denying the averments made in support of the writ petition and contended that the labour court, after thorough evaluation of evidence and submission, has passed a clear order and thus there is no need to interfere with the order of the Labour court, cuddalore and hence prayed for dismissal of the writ petition.

10. Writ court, upon hearing the submissions of both parties and after perusing the materials available before it, passed an order dated 08.03.2010, allowed the writ petition and setting aside the order of the labour court dated 17.04.2000 made in C.P. No.88 of 1993. Order of the writ court reads thus:

"5. Before the Labour Court on behalf of the second respondent, five documents were filed and were marked as Exs.W1 to W5. On the side of the petitioner management, thirty six documents were filed and were marked as Exs.M1 to M36. The second respondent examined himself as WW1. On behalf of the petitioner management, Mr.Kasiraman, was examined as MW1.

6. The Labour court held that as per Exs.M32 and M33, the second respondent/workman has been paid salary for the months of January and February 1992 and he was eligible to get salary from March 1992 to February 1994 to the tune of Rs.19,440/- and earned leave salary of Rs.324/- for the year 1991. Thereby directed the petitioner-management to pay a total sum of Rs.19,764/- to the second respondent/workman. The Labour Court further held that the workman in his deposition stated that he came to work from 01.03.1992 on several dates and whenever he asked for work to be given to him, he was asked to sit idle and no work was assigned to him. The stand of the management was that since there was a charge against the second respondent/workman with reference to the misappropriation of amounts, he was not allotted actual work in the petrol bunk and he was asked to be present at the workplace but with payment. When the management was willing to pay amounts tot he workman even without doing work due to the pendency of the enquiry against the workman, he left the place

without being present in the work spot. Therefore, it is not a fit case for the workman to claim salary under Section 33-C (2) of the Industrial Disputes Act, 1947.

7. The Labour Court after relying upon the judgment reported in 1997 (2) LLJ 1079 (Punjab Agro Industries Corporation Limited v. Presiding Officer, Labour Court and another) held that "when the employee was ready and willing to perform his work and it was entirely at the whims of the employer what exact work he wanted to take from the employee. So long as the relationship of master and servant existed between the Corporation and respondent No.2, the former was liable to pay the wages". On that plea, the Labour Court computed the wages.

8. In the instant case, the contention of the petitioner-management is that though the management is willing to pay without doing work, but they did not pay the salary for the reason that the workman was not even present at the work place. It is the fault on the part of the workman who left the work spot without being present. It is further submitted that such a disputed fact cannot be gone into in a petition under Section 33(C)(2) of the Act.

9. This court is not inclined to appreciate the stand taken by the Labour Court. Hence, the impugned order dated 17.04.2000 made in C.P. No.88 of 1993 by the Labour Court, Cuddalore is set aside and the writ petition stands allowed. No costs.

10. In view of the allowing of the writ petition, the petitioner-management is at liberty to withdraw the entire amount lying in deposit with the Labour Court. Consequently, connected miscellaneous petition is closed."

11. Being aggrieved by the order of the writ court dated 08.03.2010 made in W.P. No.9544 of 2000, appellant/workman has filed the instant writ appeal.

12. Mr.M.V.Venkataseshan, learned counsel for the appellant contended that the writ court failed to consider that the first respondent deliberately kept the appellant out of employment which compelled him to file a petition under Section 33-C(2) of the Industrial Disputes Act, 1947 and therefore, the finding of the writ court that it is the fault on the part of the workman, who left the work spot without being present and that such a disputed fact cannot be gone into in a petition filed under Section 33(c)(2) of the Act, is contrary to law.

13. He further contended that the writ court failed to note that the first respondent denied employment to the appellant from January 1992 to February 1994, for which, the appellant had

sought for the relief under Section 33-C(2) of the Act and it is within the purview of the Act and hence the finding of the writ court is unsustainable.

14. Per contra, Mr.G.Jeremiah, learned counsel for the first respondent-management submitted that the writ court, on proper evaluation of facts and perusal of the order impugned and upon hearing the submissions of the parties, has correctly passed the order holding that it is the fault on the part of the workman, who had left the work spot. He further submitted that disciplinary proceedings have been initiated, against the appellant and that he was lateron revoked. He further contended that even for the leave period, the Labour Court has awarded salary, which is erroneous.

15. Inviting the attention of this Court to the claim petition in C.P.No.88 of 1993, learned counsel for the respondent submitted that there are no averments, touching upon Ex.P5, but evidence was adduced. It is his further submission that the well considered order of the writ court does not call for any interference and hence prayed for the dismissal of the writ appeal.

16. Heard the learned counsel appearing for both parties and perused the materials available on record.

17. Section 33C(2) of the Industrial Disputes Act, 1947, reads thus:

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months:

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.

18. In C.P.No.88 of 1993, the Labour Court, Cuddalore, framed the following question,

"Whether the petitioner is entitled for the relief sought for? If so, what is the service benefits payable to him?"

19. After considering the evidence and submissions, the Labour Court, vide order, dated 17.04.2000, allowed the claim petition, as hereunder:

"5. Point No.1: It is submitted that the petitioner was employed as clerk in the petrol bunk of the respondent. Under Ex.B.1 dated 21.4.76 the respondent has appointed the petitioner as clerk. The contention of the petitioner is that from 1.3.92 he was not given employment inspite of repeated requests even though he was neither suspended nor removed from service; nor had he resigned. He was not paid salary from January and February 1992. He claims a sum of Rs.21,384/- as salary from January 1992 to February 1994 with the leave salary. On the side of the respondent it is contended that for the misappropriation committed by the petitioner on 9.1.1992, a charge memo was issued on 20.3.92 and thereafter he went on continuous leave, the petitioner received salary for January and February 92, that from 21.3.92 the petitioner did not attend duty and that he was not entitled for any relief. The petitioner examined himself as P.W.1 and marked Exhibits P-1 to P-5. One Kasiraman, was examined on the side of the respondent and marked exhibits Ex.M-1 to M-36.

6. Under Sec.33(c) (2) of the Industrial Disputes Act, an application can be filed only for payments directed to be paid by Labour Court or under a conciliation with the management. An employee can file a petition under Sec.33(c) (2) only based on the right already accrued. Here the petitioner claimed wages and leave salary for the period of employment. But the main contention of the petitioner in this petition is that, during the employment from 1.3.92 his several request for re-employment, the same has been rejected by the respondent management and the salary was not paid from January 1992 to and February 1994 and his claim for leave salary for the year 1991 has to be paid by the respondent management. But when the petitioner was examined in the court he stated that on from 1.3.92 he was in continuous service, only on when he was working in petrol bunk on 2.3.92 there was shortage of amount, for rectifying that shortage he sought leave from the respondent management by submitting a letter. Subsequently on 9.3.92 the petitioner went to the petrol bunk and submitted a medical certificate for obtaining medical leave for a week, which has been marked as exhibit P-1. P.W. 1 Narayanan in his examination states that on 12.3.92 he sought further time, for making up the money and gave

petition, subsequently on 16.3.92 when he went there they asked him to give a letter as if he has some domestic work and he gave the same as requested by the respondent. Those leave letters have been marked as Ex.B-7 to B-10. Ex.B-7, dated 2.3.92 is the leave letter. In that he requested leave from 2.3.92 to 7.3.92. Ex.B-8. request of leave from 2.3.92 to 18.3.92 letter. Ex.B-9 request of leave from 12.3.92 to 14.3.92. Ex.B-10 letter given for request of leave from 16.3.92 to 18.3.92. Ex.B-11 is the leave letter given by the petitioner from 2.3.92 to 7.3.92. So it is clear from the petitioner exhibits Ex.P1 and Ex.M-1, 7 to 10 documents that the petitioner has claimed leave and the same has been granted by the respondent. The contention of the petitioner is that the said leave letter was given at the instance of the respondent is not acceptable.

7. Thiru Kasiram D.W1 for management deposed that when the accounts of the petrol bunk were verified at 10.30 am on 9.1.92 a shortage of Rs.3,202 /- was found. The petitioner himself gave a letter to that effect and the same is marked as M-2. Similarly there was shortage in petrol and oil for which the petitioner gave a letter under Ex.M-3 and a shortage letter given by the petitioner marked as Ex.M-4. Ex-5 is the show cause notice issued to the petitioner. Ex.M-6 is the letter of handing over charge to Namachivayam. From those documents it is clear that there was shortage of stock as well as money and the petitioner handed over the charge. It is not necessary to consider whether the petitioner has caused shortage to the respondent in this petition. What is all to be considered in this petition is that whether the petitioner has served in the respondent and what amount he is entitled for.

8. When considering the contention of the petitioner is that the arrears of salary from January 1992 to February 1994, it is seen that as per the order of the respondent management the petitioner handed over the charge to Namachivayam on 29.2.92. The petitioner states that, when he went to job from 1.3.92 as per the request of the respondent he has given leave letters to the respondent management. Exs.M-7 to M-10 were marked by the management. As already examined, under Ex.P-1 and M-7 to M-10 the petitioner has sought leave from 2.3.92 to 18.3.92. The contention of the petitioner is that was submitted at the instance of the management not acceptable. D.W-1 Kasiram states that the petitioner came on 19.3.92 and sought leave for 19.3.92 and 29.3.92. On 20.3.92 charge memo was issued. Thereafter he was never

prevented from coming for employment as he was not suspended. But there was no leave letter from the petitioner. Then in February 1994, he was removed from service. He was paid salary for 19.3.92 and 20.3.92. There was deduction of provident fund evidenced by M-34 and receipt from the office is M-35. But under Ex.P-2 letter it is stated that the petitioner was ready for employment from 23.3.92 and that he was not offered any employment. The acknowledgement of the letter is M-5 marked through D.W-1. So under Ex.P-2 it seems that after his leave from 2.3.92 to 18.3.93 though the petitioner came to the office he was not given employment and he has given letter offering to render service. P.W-1 in his cross examination admitted that he was given a charge memo on 20.3.92, but till 21.3.92 he was not given employment, and even on 22.3.92 till 1p.m. he was not given employment and the same case on 19.3.92 and 20.3.92. When he went to work on 23.3.92 he was made to wait till afternoon and thereafter he went back. The letter sent by him was marked as Ex.P-2 So from the evidence it is clear that after his leave from 2.3.92 to 18.3.92 when the petitioner went for job on 19.3.92 and 20.3.92 he was not offered employment as per Ex.P-2. So, whether the conduct of the petitioner, in not going to job from 23.3.92 is to be considered as abandonment of job? Or to be considered that respondent did not offer employment. This is the main point for determination. From the side of the petitioner, it is contended that he went to duty on 23.3.92 but was not allotted work, that he was neither suspended nor removed from service. When the management did not assign any work, it was presumed that he was employed during that period. In support of this contention, a decision reported in 1991(11) L.L.J. page 133 was cited, wherein it is held as follows:-

"After all that the workman can do is to report himself on duty. It is with the employer to take work from or not. The workmen cannot snatch the work from the employer. It rests on the sweet will of the employer to take or not take work from the workmen. But the workman cannot be denied, the wages when he reports himself on duty but the work is not taken from him by the employer."

So when the petitioner was ready to perform his duty when the respondent did not allot work and it was contended by the petitioner that the management is liable to pay wages based on the above cited decision is not without substance. Further it was contended on the side of the petitioner that when the respondent management had neither suspended nor

permanently removed the petitioner from service there subsisted employer and employee relationship and in such circumstances the petitioner is deemed to be service and he is entitled for wages. In support of his contention the decision reported in 1997 (2) L.L.J 1079 was cited whereby it has stated as follows:-

"The employee was ready and willing to perform his work and it was entirely at the sweet whims of the employer what exact work he wanted to take from the employer. So long as the relationship of master and servant existed between the corporation and respondent N.2 the former was liable to pay the wages"

This contention seems to be accepted. The petitioner in his Ex.P-1 letter he has clearly stated that the petitioner was ready to work, yet the management did not allot work to him. Even after that the respondent management did not allot any work. Even though the respondent issued a charge memo to the petitioner, he was not temporarily removed from service, issued charge memo to the petitioner. So Ex.M-1 Kasiram in his examination he has stated that the disciplinary proceedings were initiated on the petitioner on 1994 and he was removed from service on 1994. So when the petitioner was not temporarily removed nor suspended from service and the petitioner was not allotted with the work from 23.3.92, even though there is employer and employee relationship the respondent is entitled to pay wages to the petitioner for the said period, is clear from above cited decision. The other contention raised the respondent is that the petitioner was not allotted with the work, the petitioner came to the work place daily is his duty, the non allotment of duty to the petitioner even when he came to the work place the respondent has not allotted work, so the respondent was not entitled to pay wages the above said contention was not acceptable. The petitioner has submitted leave letter from 2.3.92 to 18.3.92. Then from 23.3.92 though he came to work place he was not offered employment as per Ex.P-2. The respondent has taken disciplinary proceedings he was not removed from service. The contention of the respondent is that when he was not allotted with work, he will be deemed to be employed only when he came to the work placed then only he is entitled to get wages is not acceptable: When an employee cannot face the management in equal force this court has considered the subject case of the respondent. When the petitioner was ready to work and when the management without any justification declined employment he should have been suspended with subsistence allowance. When such subsistence allowance

was not paid to the petitioner the contention of the respondent that he was not offered employment by the management is reasonable and it cannot be rejected.

9. In the decision reported in 1996 (2) LLJ 892 an employee was removed from services on 1-2-82, he was re-employed, then he was removed on 19-4-88. The court held that the petitioner was entitled for wages from 1-2-82 to 18-4-88. Therefore when the respondent till the date of removal from employment the relationship was employer and Employee subsists and therefore the respondent is liable to pay wages. The respondent contended that from 23-3-92 the petitioner did not seek employment. So he must be considered he abandoned work and therefore he was not entitled for wages. Such a contention is not acceptable.

10. Now we have to consider to what amount the petitioner is entitled. From M.32 and M.33 the petitioner has been paid wages for January and February 1992. The evidence for such payment is found in these documents. P.W.1 also admitted that he received a sum of Rs. 500/- for Mahamaham expenses. So from M.32 and 33 the petitioner has received salary for January and February 1992 and he is not entitled for the same. The petitioner is entitled for salary from March 1992 to February 1994. For the leave salary of 1991, from the evidence of D.W.1 Kasiraman, whether the same was adjusted towards wages, he has to verify the records. He also states that every year a particular number of days of leave can be saved. So the evidence of D.W.1 is not clear about the payment of leave salary for 1991. So the management has to pay salary to the petitioner from March 1992 to February 1994 calculated as Rs. 19,440/- and leave salary of Rs. 324/- for 1991 and in all respondent is liable to pay a sum of Rs. 19,764/-. This point is answered accordingly.

11. In the result of the petition is allowed in part. The respondent is directed to pay a sum of Rs. 19,764/- being wages and leave salary to the petitioner under sec. 33(c) (2) of the Act."

20. Perusal of the order of the Labour Court, shows that under Ex.P1, the appellant has sought for leave from 02.03.1992 to 18.03.1992. As per the deposition of DW.1, the appellant came to duty on 19.03.1992 and sought for leave from 19.03.1992 to 29.03.1992. Charge memo, dated 20.03.1992 has been issued. He was not suspended. Ex.P2 is the letter, requesting employment from 23.03.1992 and acknowledged under Ex.M5, marked through DW.1.

21. Labour Court has considered the oral evidence of the appellant, Ex.P2 and addressed the issue, as to whether, the appellant was given any work or he had abandoned the job. Charge memo, dated 20.03.1992 is for the alleged misconduct, for the earlier period. Though the respondent in their counter affidavit has stated that the period from 21.03.1992 to 29.03.1994, was one of authorised absence and without leave, there is no notice or charge, calling upon the appellant to submit explanation, for the said period.

22. When the appellant was not suspended, placing reliance on Jaipur Development Authority vs Labour Court And Ors. [1991 (11) L.L.J. 133] and Punjab Agro Industries Corporation Limited v. Presiding Officer, Labour Court and another [1997 (2) LLJ 1079], the Labour Court has directed the employer to pay a sum of Rs.19,764/- being wages and leave salary to the petitioner under Section 33(c) (2) of the Industrial Disputes Act, 1947.

23. Though the learned counsel for the respondent submitted that evidence adduced, without averments, need not be looked into, the same cannot be accepted, for the reason that the question before the labour Court was, whether the appellant was denied employment or not and for that purpose, evidence has been adduced.

24. While setting aside the order of the labour Court in C.P.No.88 of 1993, dated 17.04.2000, the writ Court has ordered as hereunder:

"8. In the instant case, the contention of the petitioner-management is that though the management is willing to pay without doing work, but they did not pay the salary for the reason that the workman was not even present at the work place. It is the fault on the part of the workman who left the work spot without being present. It is further submitted that such a disputed fact cannot be gone into in a petition under Section 33(C) (2) of the Act."

25. Material on record discloses that the respondent-management did not provide work and thus, the appellant under Ex.P1, requested the management to provide work. The contention of the appellant that he was not provided with work, is also fortified by the submission of the management made before the Writ Court and they were willing to pay, but without providing work. But the appellant was not at the work spot. Such stand shows the attitude of the Management that the appellant should be present, but he would not be given any work. When the Management before the Labour Court had contended that the

appellant was not suspended and remained in employment, the appellant is entitled to salary for the abovesaid period, ie., from 21.03.1992 to 29.03.1994. The appellant is also entitled to the leave salary. First respondent-management is directed to make payment of Rs.19,764/- to the appellant, within two weeks from the date of receipt of a copy of this order.

26. In fine, the order of the writ Court, is set aside. Hence, the Writ Appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

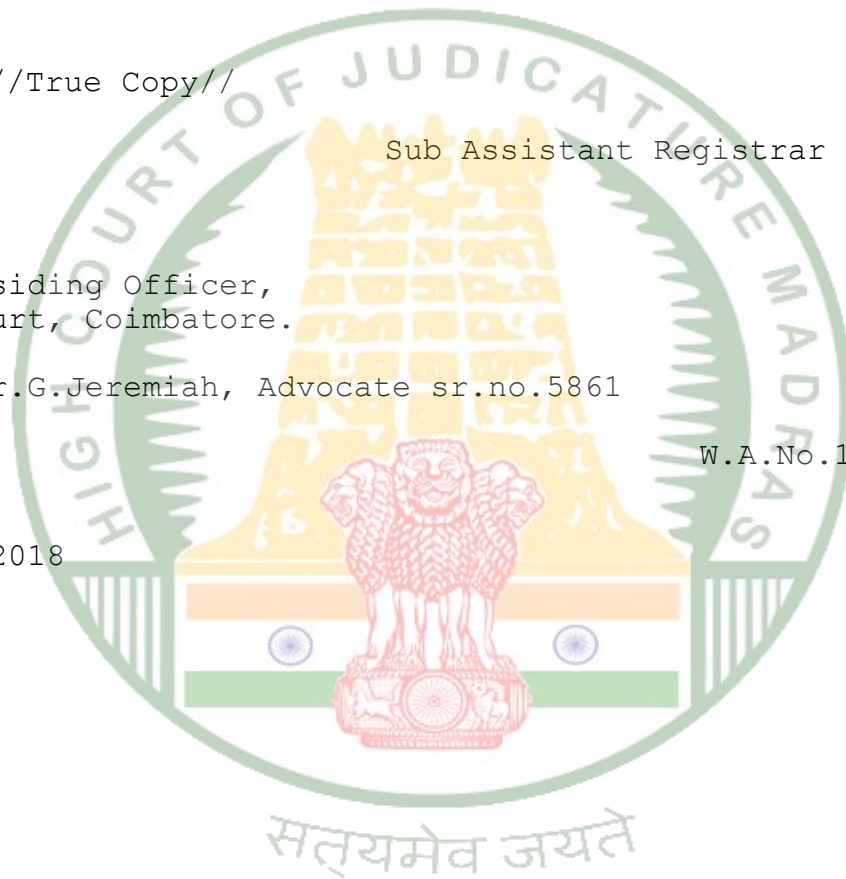
asr

1.The Presiding Officer,
Labour Court, Coimbatore.

+1cc to Mr.G.Jeremiah, Advocate sr.no.5861

W.A.No.1595 of 2018

sj(co)
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