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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON: 16/8/2018

ORDERS PRONOUNCED ON: 20/9/2018

C O R A M

The Honourable Mr. Justice S. Manikumar
a n d
The Honourable Mr. Justice Subramonium Prasad

Writ Appeal No.901 of 2016

The Assistant Vice President
Human Resource & Development
Lakshmi Vilas Bank Ltd
Corporate Office
LVB House
No.4 Sardar Patel Road
Guindy
Chennai 600 032.

... Appellant

Vs

1. The Deputy Commissioner of Labour
Government of Tamil Nadu
Salem.

2. B. Madheswaran ... Respondents

Appeal filed under Clause 15 of the Letters Patent against the order dated 1/6/2016 passed in W.P.No.17368 of 2016.

W.P.No.17368 of 2016

Petition filed to issue a writ of certiorari, to call for the records relating to the Impugned Order dated 19.12.2015 passed by the Deputy Commissioner of Labour Salem the Appellate Authority under the Tamil Nadu Shops and Establishments Act 1947 the 1st respondent herein in TSE No.1 of 2011.

For Appellant ... Mr.V.Karthic
Senior Counsel
for M/s.T.R.Sathiyamohan

For Respondents ... Mr.R.Md.Nazarullah
for Mr.K.V.Shanmuganathan
for R.2.



J U D G M E N T

(Judgment of the Court was made by Subramonium Prasad,J)

Instant appeal is directed against the judgment, dated 1/6/2016, passed by the learned Single Judge of this Court, in W.P.No.17368 of 2016.

2. Appellant is Lakshmi Vilas Bank Limited, Chennai. Second respondent joined the services of the appellant Bank, as Peon. Respondent was not permitted to work from 1/4/2009. No notice was given to him prior to termination of service. No charges were framed against him and no compensation was given to him.

3. Second respondent, approached the Appellate Authority, under the Tamil Nadu Shops and Establishments Act, 1947, challenging his removal from service, by filing an appeal, under Section 14 (2) of the Tamil Nadu Shops and Establishment Act, 1947. Appellant Bank refuted all the contentions. According to the Bank, second respondent herein was never appointed, on a substantive basis. He was temporarily engaged to perform the work, as and when any staff went on leave. It was contended that he had not worked, beyond the period stipulated, under Section 25 B of the Industrial Disputes Act. It is therefore, stated that there was no question of termination of service. Appellate Authority, under the Tamil Nadu Shops and Establishment Act, came to the following conclusions:-

a. The appellant had been employed, on temporary basis, in the respondent Bank, in the year 1999 to 2009.

b. No order of removal from service was issued.

c. On consideration of Exs.P.1 and P.2, it is confirmed that the appellant has requested, for regularisation of service every now and then and the same was recommended by the Branch Manager to the Head Office.

d. The respondent has not filed any acceptable documents to show that the said person has only worked less than 100 days. The statement of M.W.1 in his cross examination has stated that "it is correct to state that in all the vouchers the name of the petitioner was not written and signature not obtained and that the disbursement of wages was not shown in Ex.M.2 Ledger Account". The statement of MW 2 in his cross-examination that "the year wise vouchers from 1999 to 2009 under which the petitioner received wages for his engagement has been filed as Ex.M.5", will show that complete documents have not been filed by the bank to prove that the employee has not worked for the requisite number of days.

e. The workman has served in the respondent Bank for 10 years. The respondent Management without cautioning him that there is no possibility at all to regularise his service, that



f. It has been provided in Tamil Nadu Industrial Employment (Conferment of Permanent Status) Act, the person who has worked for 480 days in 24 months should be regularised in service. It has not been proved by the respondent that this workman has not worked for even 240 days and on the other hand, it has been admitted by the respondent that the worked from 1999 to 2009. Further, the removal from service of the person who have worked for 10 years without notice, enquiry or order is against the principles of natural justice.

"7. A perusal of the impugned order would go to show that based on the evidence, both oral as well as documentary, the first respondent has rightly come to the conclusion that the services of the second respondent was engaged by the Petitioner Bank right from 1999 till 2009. It is even admitted by the witnesses produced by the petitioner Bank that the second respondent was engaged for ten years. However, he was not continuously employed and only when contingency arises, his services were utilised. The documents with regard to the nature of work, the number of days the second respondent worked should be available with the petitioner Bank. It is settled law that the best person to produce the document is the person, who is in possession of the document.

9. It is admitted by M.W.1 that in all the vouchers, the signatures of the second respondent were not obtained. The payment of amount to the second respondent had not been



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reflected in Ex.M2 ledger. Further, it was admitted by the Branch Manager himself that recommendation for regularisation of the second respondent was sent to the higher authorities and as per Ex.P2, a reply was also given by the Head Office that recommendation would be considered at the appropriate time. The aforesaid evidence of M.W.1 and M.W.2 was rightly considered by the authority and came to the conclusion that the second respondent worked for 10 years. Further, as per Section 25(f) of the Industrial Disputes Act, without notice, no workman can be terminated from service."

5. Being aggrieved, Lakshmi Vilas Bank has come forward with the instant Writ Appeal.

6. Heard the learned counsel for the parties.

7. Mr.V.Karthick, Learned Senior Counsel appearing for the appellant would contend that material on record would show that second respondent was engaged only on contingent basis. He would rely on the vouchers, which had been filed in the Courts below to demonstrate that the second respondent has not worked continuously. He would further submit that on many occasions, the respondent was paid in cash. According to the learned Senior Counsel, it was for the respondent to first establish that he has worked for the requisite amount of days, in order to claim, for regularisation.

8. Learned counsel would rely on 2018 (5) Scale - 717 Mohd. Ali Vs. State of H.P and Others and more particularly, paragraph 12 of the said judgment to submit that in order to invoke Section 25 F of the Industrial Disputes Act, it is necessary to count 240 days, during the period of twelve calendar months and this can be arrived at by first determining the date of termination and then move always for twelve months just receive the date of retrenchment and then ascertain within the past twelve months, workman has rendered the requisite service. According to him the respondent has not been able to establish that he has worked for the requisite number of days and there was no necessity of any enquiry etc., before removing him from the service.

9. Learned Senior Counsel also relied on a judgment, reported in {(2002) 3 SCC - 25}, Range Forest Officer Vs. S.T.Hadimani, wherein it was held as under:-

"In our opinion, the Tribunal was not right in placing the onus on the management without



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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."

10. Section 25 F of the Industrial Disputes Act, reads as under:-

"Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -

(a). the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b). the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c). notice in the prescribed manner is served on the appropriate Government or such authority as may be specific by the appropriate Government by notification in the Official Gazette.

11. Section 41 of the Tamil Nadu Shops and Establishment Act, reads as under:-

"Notice of dismissal - (1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2). The person employed shall have a right to appeal to such authority and within such time as may prescribed either on the



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ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

3. The decision of the appellate authority shall be final and binding on both the employer and the person employed."

12. Short issue which arises for consideration is

"Whether the termination of the petitioner without issuing the notice to the second respondent is correct or not and whether the dismissal of the petitioner is in violation of Section 25 F of the Industrial Disputes Act and Section 41 of the Tamil Nadu Shops and Establishment Act, 1947?"

13. At this juncture, it is relevant to extract the deposition of the cross-examination of the Manager of the branch.

"I am working as Manager of Kangayam Branch from 6/7/2013. I have not performed any work in Kangayam Branch from 1999 to 2009. I am not directly aware of the details regarding the work of the petitioner. In respect of the case filed by the petitioner, none of the Branch Manager who had worked from 1999 to 2009 have given any report in writing. I have also not prepared and filed counter statement in the case. It is correct to state that a details of the rules of recruitment of the sub-staff in the Bank was not stated either in the proof affidavit or in the counter statement. It is correct to state that no person can perform duties in our Bank on his own. It is correct to state that only the Branch Manager has engaged the petitioner on daily wages basis from the beginning of the engagement. It is correct to state that the Branch Manager is responsible for the mistake if any in the engagement of the petitioner. it is correct to state that no order was passed by the Head Office that the petitioner has been improperly appointed and as such he should be terminated from service. I am not aware as to the details regarding which are all the months and whatever dates the petitioner has worked. I am not aware of the details as to how many days every year the petitioner has worked. I am not also aware as tot he number of days of service workmen should have worked as per Tamil Nadu Shops and Establishments Act. No documents have been filed to show that the daily wages work

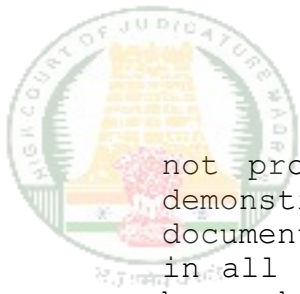


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is not a recognised employment. It is correct to state that the petitioner was continuously given representations through the Branch Manager for regularisation of his work. It is correct to state that the Branch Manager and also recommended those letters to the Head Office. It is correct to state that the officials of Head Office has not supervised and initialled in the attendance register. It is correct to state that while looking at the respondents Exhibit No.2 it cannot be stated as to what entries made there in refers to. Ex.M.3 which is the petitioners savings accounts. It is true that the said document has not to been attested. It is correct to state that Ex.M.4 pertains to only four employees out of seven. In this documents also the officials of our Bank have not signed. Ex.M.5 are the vouchers by which the petitioner was paid daily wages. I have not seen the specimen signature of petitioner. In all the vouchers the name of the petitioner is not written and signature not obtained. It is correct to state that in Ex.M.2 Ledger Account the disbursement of wages in Ex.M.5 has not been shown. It is not correct to state that the documents in respect the petitioner was suppressed and the present respondent Ex.M.2 to M.5 have been created and filed. I am not aware as to whether the documents sought for by the petitioner vide Notice through Court has been filed. It is correct to state that I have not been given any authority by the Head Office for tendering evidence in the present case. I am not aware as to whether petitioner had worked in Kangayam Branch as Peon for about 10 years from 1999 to 2009. It is not correct to state that the Management orally terminated the petitioner without regularising the service. It is not correct to state that without directly being aware of the employment of the petitioner, I am tendering false evidence. It is not correct to state that the Management of the Bank is responsible for the relief sought for in the appeal.

(emphasis supplied)

14. Reading of the cross-examination would show that in the vouchers, signature of the Officer of the Bank is not present. It is also admitted that name of the second respondent is also absent in the vouchers. It is also admitted that the second respondent was in service from 1999 to 2009. Appellant has



not produced records, pertaining to the second respondent, to demonstrate that he has worked for less than 100 days. Complete documents have not been filed. Admission of the Manager that in all the vouchers, signatures of the second respondent had not been obtained and payment of the amount to the second respondent is not reflected in the ledger is fatal to the case of the appellant. The appellant having not filed all the documents, adverse inference has to be drawn against the appellant. The appellant has admitted that the respondent No.2 has worked from 1999 to 2009. The workman cannot be expected to produce the records and prove he worked for the above said period. It is difficult for the workman to keep the record. Rather, it is the duty of the management to produce relevant records.

15. Contention of the learned Senior Counsel that the second respondent had worked for more than 240 days, cannot be accepted.

16. The Hon'ble Supreme Court in Kanpur Electricity Supply Company Limited Vs. Shamim Mirza {(2009) 1 Supreme Court Cases 20}, has observed as under:-

17. Relying on Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari⁴, learned counsel urged that the workman having produced more than prima facie evidence, no fault could be found with the findings of fact recorded by both the courts below in favour of the workman, this Court should be loathe to interfere.

18. Mr. Praveen Chaturvedi, learned counsel appearing for the other workman - Manoj Srivastava, in order to buttress his (2005) 10 SCC 792 argument that the respondent was under the administrative control of the appellant, invited our attention to an office note dated 26th July, 1994 (Ex.34) issued by the Managing Director of the appellant to some of its cashiers, which included the name of the respondent, threatening action against them for not depositing the cash amounts collected by them. He, thus, contended that the document proves, beyond doubt, the employer-employee relationship between the appellant and respondent.

19. Having considered the matter in the light of the material referred to and relied upon by the adjudicatory authority, in our judgment, the High Court was justified in declining to interfere in both the matters.

20. It is trite that the burden to prove that a claimant was in the employment of a particular management, primarily lies on the person who



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claims to be so but the degree of proof, so required, varies from case to case. It is neither feasible nor advisable to lay down an abstract rule to determine the employer-employee relationship. It is essentially a question of fact to be determined by having regard to the cumulative effect of the entire material placed before the adjudicatory forum by the claimant and the management.

17. Similarly, the Hon'ble Supreme Court in Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda { (2010) 1 Supreme Court Cases 47, has observed as under:-

"15. The respondent claims that he was employed in the year 1985 as a watchman and his services were retrenched in the year 1991 and during the period between 1985 to 1991, he had worked for a period of more than 240 days. The burden of proof is on the respondent to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. The law on this issue appears to be now well settled.

16. This court in the case of R.M. Yellatty vs. Assistant Executive Engineer [(2006) 1 SCC 106], has observed :

"17..... However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."

17. Applying the principles laid down in the above case by this court, the evidence produced by the appellants has not been consistent. The appellants claim that the



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respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service.

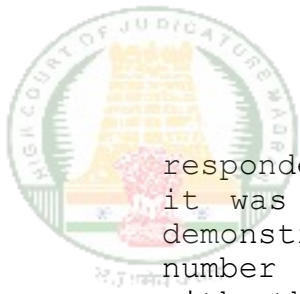
18. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witness produced by the appellant stated that the respondent stopped coming to work from February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also.

19. It has also been observed by the High Court that the muster roll for 1986-87 was not completely produced. The appellants have inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, in spite of the direction issued by the labour court to produce the same. In fact there has been practically no challenge to the deposition of the respondent during cross-examination. In this regard, it would be pertinent to mention the observation of three judge bench of this court in the case of Municipal Corporation, Faridabad Vs. Siri Niwas [(2004) 8 SCC 195], where it is observed:

"15. A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against this contentions. The matter, however, would be different where despite direction by a court the evidence is withheld."

(emphasis supplied)

18. Findings of the Courts below and the evidence let in by the Manager would show that the Management had not produced all the documents. On the other hand, the deposition show that the records of the appellant are incomplete. When the second



respondent takes a stand that he was worked for ten years, then it was the duty of the Management to produce the records to demonstrate that the workman has not worked for the specified number of days. Appellant has not filed the documents along with them coupled with the fact that their own witness had admitted that signatures of the second respondent had not been obtained on the vouchers and that payments in the vouchers are not reflected in the ledger. It is also the admitted fact that the second respondent was pressing for his regularisation. Order of the Appellate Authority and the Single Judge therefore, do not warrant any interference.

19. Accordingly, Writ Appeal is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1.The Deputy Commissioner of Labour
Government of Tamil Nadu
Salem.

+1cc to Mr.K.V.Shanmuganathan, Advocate, S.R.No.65316

Writ Appeal No.901 of 2016

SS(CO)
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