

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2018
PRONOUNCED ON : 23.04.2018

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE MR.JUSTICE M. DHANDAPANI

W.A.No.2070 of 2013

&

M.P.No.1 of 2013

1. The Secretary,
A.M.M. Charities Trust,
No.28, Balaji Street,
Madras 600 001.
Presently
A.M.M. Foundation,
No.3, Sriram Nagar North Street,
Alwarpet, Chennai- 600 018.
2. The Head Master,
Sri Ramasamy Mudali Higher Secondary School,
Ambattur, Chennai-53.
(Cause title accepted vide order of Court dt.26/7/2013
made in M.P.No.1/2013 in WASR.54869/2013)
....Appellants

..Vs..

1. T.M.Velu
2. The Presiding Officer,
I Additional Labour Court,
Chennai-600 104. Respondents

Prayer :- Writ Appeal filed under Clause 15 of Letter Patent Act, to set aside the order dated 02.04.2013 made in W.P.No.32268 of 2004.

W.P.No.32268 of 2004:

Writ Petition filed under Article 226 of the constitution of India for the issuance of a Writ of Certiorari calling for the records pertaining to the award made in I.D. No. 99/94 dated 28.11.2003 by the first respondent and quash the same.

For Appellants : Mr.S.Thanka Sivan
For Respondents : Mr.R.Ganesh (R1)

J U D G M E N T

(Judgment of the Court was made by M. DHANDAPANI, J.)

This intra court appeal is directed against the order dated 02.04.2013 in W.P.No.32268 of 2004, wherein the learned single Judge quashed the order of the Labour Court dated 28.11.2003 made in I.D.No.99 of 1994 and directed the appellants herein to reinstate the first respondent into service. Feeling aggrieved by the same, the respondents have filed this intra court appeal.

2. The facts of the matter leading to filing of this appeal are as follows:

(i) The second appellant is a Government aided institution and is run by the first appellant trust. The appointment of the staff and workmen in the second appellant institution were made only upon the approval of the Government. While so, during the year 1984, when the regular watchman of the second appellant was on leave, the first respondent herein was engaged for a short period of not more than two weeks and that too when the second appellant's regular watchman was on leave, as a substitute purely on ad hoc basis. The first respondent was not engaged for more than two weeks, at any point of time.

(ii) Admittedly the second appellant is an aided institution and therefore

neither the teaching staff nor the non teaching staff can be appointed without following the procedure. However, the first respondent filed I.D.No.99 of 1994 on the file of the second respondent claiming that the first respondent was employed in the second respondent institution from 01.10.1984 as a Night watchman and that he was paid monthly salary of Rs.150/- and that no appointment order was issued to the first respondent and that he was in employment until 28.04.1985. After expiry of two years from 1985, the first respondent was once again appointed as peon in the second appellant institution from 01.06.1987 and that he was in employment until 31.07.1988. Thereafter, on 01.08.1988, when the first respondent came to the second appellant institution, the second appellant informed the first respondent that there is no work for the first respondent. Thereafter, after a lapse of about three years, the first respondent wrote letters to the first appellant as well as Educational authorities seeking re-employment. The first respondent further contended that he had worked continuously for 240 days and that the second appellant had not terminated his employment by following due process of law. With the above claim, the first respondent raised an industrial dispute before the second respondent in I.D.No.99 of 1994, before the second respondent. After elaborate enquiry and full fledged trial and after examining the Management witness as well as workmen

witness, the Labour Court dismissed the I.D.No.99 of 1994 on 28.11.2003. Aggrieved by the same, the first respondent filed Writ Petition before this Court in W.P.No.32268 of 2004. This Court by an order dated 02.04.2013 allowed the Writ Petition by setting aside the award of the second respondent dated 02.04.2013 in I.D.No.99 of 1994 and directed the appellants to reinstate the first respondent, within a period of two months from the production of the copy of the order. Against which, the present appeal is filed.

3.The learned counsel appearing for the appellants Management would submit that the appellant school is a Government aided school and they cannot violate the sanctioned strength granted by the State Authority and for the vacancy of the sanctioned strength, appointment should be made only through Employment Exchange and through him this staff patron was approved by the District Educational Officer for the year 1984-85 and 1999-2000. The said approval letters were marked as Ex.M1 and Ex.M2. Ex.M1 categorically depose that there was no vacancy for the post of watchman and peon during the year 1984 and 1987 and the first respondent was engaged casually for a short period only on daily basis, whenever the regular employee was on leave. Apart from the above, the first respondent has not proved that he was continuously employed for 240 days in a Calender year. The initial burden lies on the first respondent to prove that he has worked for 240 days in a Calender year. The basic requirement for proving the same is that there must be a valid appointment order and through that, the first respondent should establish that he was continuously employed for 240 days in a calender year. In the present case, the first respondent has not established that he has continuously worked for 240 days in a Calender year. Accordingly, the Labour Court arrived at a right conclusion and rejected the claim of the first respondent. However, the learned Single Judge, without considering the well considered order of the Labour Court, passed an order directing to reinstate the first respondent, which is un-sustainable one. Accordingly, he prayed for allowing the writ appeal.

4.The learned counsel appearing for the first respondent would submit that the first respondent has worked for more than 240 days in a Calender year continuously without any break during the year 1987-1988 and he was orally retrenched from service without giving any reasons. Thereafter, the first respondent approached the first appellant for reinstatement, but he was not reinstated in service. Therefore, the first respondent raised industrial dispute under Section 2(A)(2) of the Industrial Disputes Act, 1947. The learned counsel further submitted that the petitioner worked in the second appellant school on two spells in the post of night watchman as well as peon. The learned Single Judge has observed in his order that during the pendency of the Industrial Dispute, the first

respondent has filed an application to send for the documents namely, attendance register and muster roll to place before the Labour Court for appreciation. However, those documents have not been produced by the first appellant/ Management. Hence, the learned Single Judge rightly arrived at a conclusion that the first respondent has worked continuously for more than 240 days in a calendar year without any break in service and directed the appellants to reinstate the first respondent into service. Hence, the well considered order of the learned Single Judge need not be interfered with and accordingly, he prayed for dismissal of the writ appeal.

5. Heard the learned counsel appearing for the appellants as well as the learned counsel appearing for the first respondent.

6. The case of the first respondent is that the second appellant Higher Secondary School appointed the first respondent as Night Watchman on 01.10.1984 and he was given a consolidated pay of Rs.150/- per month. However, he was dismissed from service on 29.04.1985. Again, he was engaged by the first appellant Trust and second appellant school as peon on 01.06.1987 and worked continuously till 31.07.1988. The salary for the month of July 1988 was also not paid to him. The first respondent has worked for more than 240 days during 1987 and 1988. On 01.08.1988, he was orally retrenched from service by the second appellant without giving any reason. Thereafter, the first respondent approached the first appellant to reinstate him in service. However, he was not reinstated and in the place of the first respondent, one Mohan was appointed. On the above said ground, the first respondent raised an Industrial Dispute, before the second respondent against the appellants in I.D.No.99 of 1994.

7. Before the Tribunal, the first respondent examined himself as W.W.1 and marked exhibits W-1 to W-18. On the side of the Management, the then headmaster was examined as M.W.1 and exhibits M-1 and M-2 were marked. Considering the oral and documentary evidences adduced on either side, the Industrial Tribunal dismissed the claim petition in I.D.No.99 of 1994, on the ground that the first respondent has not established his case that he had continuously worked for 240 days in a calendar year and no proof was filed to substantiate the same.

8. Challenging the same, the first respondent filed W.P.No.32268 of 2004. This Court, by an order dated 02.04.2013, allowed the Writ Petition and directed the appellants to reinstate the first respondent into service. Feeling aggrieved, the appellants have filed this Writ Appeal.

9. The learned counsel for the first respondent relied upon a decision of the Hon'ble Supreme Court in the case of

Director, Fisheries Terminal Division Vs. Bhikubhai Meghajibhai Chavda and others reported in AIR 2010 SCC 1236. Paragraph 15 of the Judgment is extracted hereunder:

15. Applying the principles laid down in the above case by this Court, the evidence produced by the appellants has not been considered. The appellants claim that the respondent did not work for 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. 240 days. The respondent was a workman hired on a daily wages basis. 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. It is the contention of the appellant that the service 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. 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 V. Siri Niwas [(2004) 8 SCC 195]: (2004 AIR SCW 5184), where it is observed.

"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".

10.This Court allowed the Writ Petition on the ground that the first respondent has worked in the second appellant's school in two spells as night watch man as well as peon. However, his appointment order was taken back by the second appellant and therefore, he is not able to produce the appointment order before the Industrial Tribunal. Believing the words of the first respondent, an adverse inference was drawn in favour of the first respondent by this Court. However, on a perusal of the materials available on records, it is seen that the first respondent has marked 18 documents before the Industrial Tribunal. In all these documents it was not established that the 1st respondent had worked continuously for 240 days in a calender year, Further, in Ex.W5 dated 21.08.1987, the first respondent himself admitted that he rendered service in S.R.M.H.S.S. as Peon and done Minor works in the absence of one Mr.Madhavan, who is the Peon of the second appellant's school. Further, during the course of admission of the students, he was engaged by the Headmaster for contingent work. In the above letter, an endorsement by the School Headmaster was also available, wherein it has been endorsed that in the absence of Madhavan, the first respondent was engaged as contingent worker. Except this document, no other document was produced to prove that the first respondent was engaged as contingent worker, in the place of Madhavan. Thereafter, though the first respondent claimed that he was denied employment, he made representation to the educational authorities on 1.11.1988 and thereafter he made the several representation to the educational authorities as school authorities for reinstatement, which were marked as i.e. Exs.W10 to W12. All these records were pertaining to the year 1991 and 1992. Thereafter, he raised industrial dispute. However, the learned Judge of this Court arrived at a conclusion contrary to the material objects and allowed the writ petition and directed the first appellant Management to reinstate the first respondent.

11.In the case on hand, the first respondent had worked in the contingent employment when the regular employee was absent. He was engaged as a contingent employee and was given a short time engagement on daily wage basis on different times. If he

has not completed 240 days in a calendar year, he is not entitled to any relief. The Industrial Tribunal rightly arrived at a conclusion that the first respondent was not able to establish that he has written a letter to the District Educational Officer on 27.03.1992 and the same is marked as Ex.W12. After making all the representations to the Management as well as the Educational Authorities, the first respondent raised an Industrial Dispute under Section 2 A of the Industrial Disputes Act, before the Assistant Commissioner of Labour in June 1992 and the same was rejected on the ground that the application was time barred one and the rejection order dated 08.09.1992 was marked as Ex.W15. Thereafter, the first respondent raised the Industrial Dispute before the Industrial Tribunal in the year 1994 and after elaborate consideration the same was dismissed by the Labour Court, the second respondent herein, by its order dated 28.11.2003 in I.D.No. 99 of 1994.

12.A perusal of the decision cited by the learned counsel for the first respondent would go to show that if the workmen is hired on daily wage basis, it would have difficulty in having access to all the official documents, muster rolls etc., in connection with his service. In the present case, the first respondent did not produce the appointment order and the categorical stand of the appellants is that the first respondent was neither appointed on daily wage basis nor on regular basis and he is only a contingent staff. He has been engaged only when the regular employee was on leave. In this background, the decision cited by the learned counsel for the first respondent is not applicable to the case on hand. The initial burden lies on the first respondent/ workmen to establish his employment. Thereafter, the employer-Management has to disprove the Employment. In the present case, the first respondent has not even established his employment with the Appellant Management.

13.The Hon'ble Supreme Court has dealt with the similar issue in the following cases and the relevant portion of the same are extracted hereunder:

(i) H.U.D.A. Vs. Jamal Singh reported in 2006 5 SCC 764

"We are unable to appreciate the approach made by the Labour Court in calculating the statutory period of 240 days in a year. In our opinion, both the Labour Court and the High Court have failed to appreciate the fact that the respondent has failed to complete the statutory period of 240 days in a year to entitle him for claiming any benefits whatsoever. As already noticed, evidence has been led to the said fact before the Labour Court but still the issue of attendance of the

respondent has been decided in his favour. This apart, the respondent was appointed only as a daily wage earner and not as a permanent employee of the appellant and hence the respondent cannot claim any right to the post in question and that no right has accrued to him to claim any benefits from the appellant. This fact has been overlooked by the Labour Court and also by the High Court. The fact remains that the respondent has not worked for the statutory period of 240 days which has been clearly established by the appellant. It is settled law that the workman has to prove that he had worked for 240 days. In the instant case, the workman has not established that he has served the appellant for the statutory period of 240 days. "

(ii) Haryana Urban Development Authority Vs. Om Pal reported in (2007) 5 SCC 742

"4.The Respondent did not produce before the Industrial Tribunal-cum-Labour Court. If offers of appointment had been issued in his favour by the two Sub-Divisions separately, the same ipso facto would lead to the conclusion that they were separate and distinct. If his appointment was only on the basis of entry in the muster roll(s), the designation of the authority who was authorised to appoint him as a daily- wager would be the determinative factor. It is not the case of the respondent that he was appointed in both the establishments by the same authority.

5.The Industrial Tribunal-cum-Labour Court unfortunately did not go into the said question at all. If both the establishments are treated to be one establishment, for the purpose of reckoning continuity of service within the meaning of Section 25B of the Act, as was held by the Tribunal, a person working at different point of time in different establishments of the

statutory authority, would be entitled to claim reinstatement on the basis thereof. However, in that event, one establishment even may not know that the workman had worked in another establishment. In absence of such a knowledge, the authority retrenching the workman concerned would not be able to comply with the statutory provisions contained in Section 25F of the Act. Thus, once two establishments are held to be separate and distinct having different cadre strength of the workmen, if any, we are of the opinion that the period during which the workman was working in one establishment would not enure to his benefit when he was recruited separately in another establishment, particularly when he was not transferred from one Sub-Division to the other. In this case he was appointed merely on daily wages.

6. In Union of India and Others v. Jummasha Diwan [(2006) 8 SCC 544], this Court opined :

"There are several establishments of the Railway Administration. If a workman voluntarily gives up his job in one of the establishments and joins another, the same would not amount to his being in continuous service. When a casual employee is employed in different establishments, may be under the same employer, e.g., the Railway Administration of India as a whole, having different administrative set-ups, different requirements and different projects, the concept of continuous service cannot be applied and it cannot be said that even in such a situation he would be entitled to a higher status being in continuous service. It is not in dispute that the establishment of Appellant 3 herein had started a project. His recruitment in the said establishment would, therefore, constitute a fresh employment. In a case of this nature, the Respondent would not be entitled to

his seniority. If the project came to a close, the requirements of Section 25-N of the Act were not required to be complied with."

7. Moreover, it is now also well-settled that despite a wide discretionary power conferred upon the Industrial Courts under Section 11A of the 1947 Act, the relief of reinstatement with full back-wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors; one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any"

14. Applying the ratio laid down by the Hon'ble Apex Court in the present case and even on a perusal of the depositions, it could be seen that the first respondent was not able to establish that he has continuously worked for 240 days in the calendar year i.e., without any break in service in the calendar year. Hence, the first respondent was not entitled to claim reinstatement in the Management.

15. Upon consideration of entire materials placed before this Court, we are of the considered view that the first respondent did not make out any case that he has continuously worked for 240 days in a calendar year. On the contrary, the Management has established that the first respondent was not employed continuously for 240 days in a calendar year. Accordingly, the first respondent is not entitled to reinstatement.

16. In view of the above discussions and decisions cited supra, the order of the Industrial Tribunal is confirmed and the order dated 02.04.2013 made in W.P.32268 of 2004 is set aside.

17. In the result, this intra court appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-

Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

To

The Presiding Officer,
I Additional Labour Court,
Chennai-600 104.

+1 CC to Mr.S.Thanka Sivan, Advocate sr 29926.
+1 CC to Mr.R. Ganesh, Advocate sr 29806.

W.A.No.2070 of 2013

KAN(CO)
SP(15/05/2018)



WEB COPY