

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2018

CORAM

THE HON'BLE DR. JUSTICE S.VIMALA

W.P.No.9413 of 2015

The Management,
Hostel Southsun Pvt. Ltd.,
Bharathi Street,
Swarnapuri,
Salem - 636 004.

.... Petitioner

versus

1. The Presiding Officer,
Labour Court,
Salem.

2. C.Ayyannar

.... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of writ of certiorari, calling for the records of the first respondent in its award in I.D.No.191 of 2010 dated 23.06.2014 and quash the same.

For petitioner : Mr.P.Nehru

For Respondents: Court for R1
Mr.K.V.Shanmuganathan for R2

ORDER

The petitioner has challenged the award dated 23.06.2014, directing the petitioner to reinstate the second respondent/worker with continuity of service and 50% of back wages for the period of non-employment.

2. The petitioner has filed this writ petition, challenging the order of the first respondent mainly on the ground that there was no termination of employment or dismissal of the workman and therefore, the question of reinstatement does not arise for consideration. The further contention is that when there is no question of reinstatement, the question of paying back wages also is out of consideration.

3. Brief facts:

(i) The workman was employed as a gardener with a duty to maintain a garden measuring 300 sq. ft.; to maintain the plant in and around the hotel and the plant inside the rooms and also

in the reception. This is what is stated in the order of appointment. However, the workman admitted that he was working under House Keeping Division, as per the order of the Supervisor.

(ii) The first respondent was on medical leave from 15.04.2010 to 17.04.2010. 18.04.2010 was a weekly holiday. He was not provided with any employment on 19.04.2010 and 20.04.2010. When he was working on 22.04.2010, he was asked to come for duty for the shift starting from 2.00 p.m. and ending by 11.00 p.m. It is the case of the workman that this change of shift, without any reason, is illegal and there was no notice under Section 9-A of the Industrial Disputes Act.

4. It is the contention of the Management that at no point of time, employment was declined to the workman and therefore, the order of the Labour Court has to be set aside. Only communication on the side of the Management is dated 04.11.2014, i.e. an offer made after the award of the Labour Court in I.D.No.191 of 2010 dated 23.06.2014. Even in the said order, the recital is that the Management is ready to offer work, without prejudice to the appeal to be filed as against the order of the Labour Court. Therefore, it is clear that the only offer made by the Management was only in the year 2014, that too after the award of the Labour Court.

5. On the other hand, the learned counsel for the workman pointed out that the workman had written two letters to the Management immediately after the Management declining employment, one on 29.04.2010 (Ex.P7) and another one on 06.05.2010 (Ex.P9). In respect of these two letters, which have been received by the Management as per Ex.P8 and P10, there is no reply from the Management. When the workman seeks employment in writing and when there is no reply from the management, the implication is that the Management was not inclined to employ the workman. In this context, the contention of the workman that the non-employment would amount to termination should be accepted. Therefore, the Labour Court has rightly concluded that if there had been no termination, there is no necessity for the workman to seek employment.

6. The Labour Court has also pointed out that when the workman had sought for employment immediately after non-employment, the Management would have provided employment, if really there had been any willingness on the part of the Management. On this ground, the Labour Court has ordered continuity of service and 50% of the back wages.

7. The learned counsel for the Management relied upon the following three decisions and contended that when the Management offered employment and when it was not accepted by the workman, it is not open to the workman to claim back wages and that the Labour Court is also not justified in awarding the same.

(i) In the case of Raju Sankar Poojary vs. Chembur Warehouse

Company and another, reported in 2003 (4) LLN 616, it has been held that where it has been the consistent case of the respondent company as has been established with the materials on record that there was no termination of services but it was a case of abandonment of services by the employee, the question of reinstatement could not arise.

(ii) In the case of Sonal Garments vs. Trimbak Shankar Karve, reported in 2003 (1) LLN 91, it has been held that whenever employer offers to reinstate workman at any stage of the dispute and the same is not accepted even without prejudice to his rights, he will not be entitled to continue his claim for reinstatement or for his claim for back-wages from the date of such offer.

(iii) In the case of Management of RAS Theatre and Presiding Officer, Labour Court, Salem and another, reported in 2004 (2) LLN 1067, it has been held that facts will clearly disclose that in spite of the repeated offers before the Conciliation Officer and before the Labour Court and the High Court, directing the petitioner to come and join duty, the employee had deliberately refrained from joining duty and has not accepted the offer of the Management.

7.1. All the three decisions will not apply to the facts of this case and the facts herein are totally opposite to the facts in those three decisions. Those decisions pertain to the Management offering employment and the workman declining the same. But, here is the case, where, the workman is demanding the job and the management was declining to employ the workman.

8. The learned counsel for the workman repeatedly contended that the Management never inclined to give any appointment to the workman. The learned counsel for the Management contended that the act of the workman would only be construed as unwillingness to get himself employed. In other words, it is contended that the non-employment was not at the instance of the Management and it was only at the instance of the workman. Whether this contention is acceptable is the issue.

9. The non-employment may be oral or in writing. The termination also be made either expressly or by implication. When the gardener is asked to water the plant at 11.00 p.m., when it can be more fruitfully done at 11.00 a.m., the implication is that the Management intends to drive out the workman by imposing unreasonable conditions of employment.

9.1. This inference is justified, when the management has not chosen to consider the contention of the workman that he had no bus service to go home after 11.00 p.m. Even though the management is at liberty to choose the time at which its employee should work, still when unreasonable conditions are imposed by not considering the inconvenience to which an

employee would be put, then the inference is that the Management wanted to impose a condition which would compel the workman to go out of employment. Despite the imposition of this condition, still the workman demands employment though in his original schedule.

9.2. In fact, the workman has been literally driven out by not responding to the letters written by him. Under the circumstances, the contention that the non-employment would amount to termination of employment under the given context is correct and it must be accepted. Therefore, the award of the Labour Court is justified and it does not require any interference.

10. In the result, the writ petition is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To:

1. The Presiding Officer,
Labour Court,
Salem.

+1cc to Mr.P.Nehru, Advocate sr.no.61395

+1cc to Mr.K.V.Shanmuganathan, Advocate sr.no.60982

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