

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.17224 of 2017

M.Raja

... Petitioner

-vs-

The Registrar
University of Madras
Chepauk, Chennai-600 005

... Respondent

Prayer:- This Writ Petition is filed, under Article 226 of Constitution of India, to issue a writ of Certiorarified Mandamus, to call for the records from the file of the respondent herein in Official Communication No.F1(B)/Esst./2016/dated 839 on 09.05.2016 and letter No.F1(B)/Esst./2017/804 on 17.05.2017 and quash the same and consequently direct the Respondent to consider the petitioner's representation dated 21.04.2016 and 17.04.2017.

For Petitioner : Mr.K.Bharathi

For Respondents : Mr.Mani Sundara Gopal

O R D E R

The Petitioner has filed this Writ Petition, challenging the Official Communication of the Respondent dated 09.05.2016 and letter No.F1(B)/Esst./2017/804 dated 17.05.2017, by which it was informed that the request for permanent post in the University of Madras, is not feasible of compliance, as the University is not recruiting the permanent, on account of the ban for recruitment imposed by the Government, with the consequential relief of Mandamus to direct the Respondent to consider his representation dated 21.04.2016 and 17.04.2017.

2. The case of the Petitioner is that he joined the respondent University (in short 'the University') as Peon on 05.01.2003 and was given work from 05.11.2003 to 31.03.2004, 15.05.2006 to 31.10.2006, 09.04.2007 to 08.03.2008 for 11 months, from 14.03.2008 to 13.02.2009, from 21.02.2012 to 25.02.2013 and thereafter in Tharamani campus from 05.06.2013 to 04.01.2013, 21.12.2015 to 18.03.2016. It is submitted that the petitioner had completed eight years of service with break. According to the petitioner, his letter dated 06.02.2009 requesting for permanent post was recommended and

duly forwarded by the Dean of Tharamani Camps to the University.

3. According to the Petitioner, the respondent, without taking into consideration the longer years of service rendered by him, rejected his application. However, the persons of lesser years of service have been regularised. The Petitioner, in support of his averments, relied on the undated Minutes of the Meeting, wherein it has been resolved as under:

"The committee noted that Thiru Raja had started working in UICIC since 15.05.2006 with breaks in between, and continued in a temporary capacity till September 2014. He had previously worked in 2003 in Registrar's Office on daily wages. The University in Sept 2012 had regularized temporary personnel who had 24 months service, but his application had been missed by oversight at that time, while all others who had been working with him were given permanent jobs."

4. The respondent would submit that in the year 2006, the petitioner was engaged in the University Industry Community Interaction Centre (hereinafter referred to as UICIC) on temporary basis as Peon, since there is no sanctioned post of peon in the UICIC. The expenditure for the same was incurred from the administrative expenses of the UICIC. It is stated by the respondent that the Government of Tamil Nadu issued G.O. (Ms.).No.44 dated 11.03.2015 stipulating that the recruitment should be made by inviting applications from all eligible persons along with names sponsored by the Employment Exchange by advertising in newspapers and other media to enable all the eligible persons to compete for the posts. The respondent denied the averments of the petitioner that artificial break was given to him to deny the regularisation.

5. It is further stated by the University that it may be true that some of the persons, who have been working along with the petitioner have been regularised, but, the fact is that they were working under the University, whereas the petitioner was not discharging any work pertaining to the University. Therefore, the petitioner is not at all entitled to any relief much less the relief sought in the present writ petition.

6. In reply to the above, it is stated by the learned counsel for the petitioner that the petitioner had rendered several years of service. There has been continuity of employment till 18.03.2016 with small breaks and that the petitioner had completed 240 days in the year preceding his termination and 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 should be paid, failing which, it can be presumed that there is a violation of Section 25F of I.D.Act.

7. According to the learned counsel for the University, the petitioner ought to have raised a dispute within three years from the date of rejection of his application. However, since the date of rejection by the respondent is on 09.05.2016, now the limitation period has already expired and therefore, he may be permitted to raise Industrial Dispute questioning the illegal termination by the respondent.

8. Heard the learned counsel on either side and perused the materials available on record.

9. It is not in dispute that the petitioner was employed from 05.11.2003 and was disengaged from work on 18.03.2016. However, the issue, as to whether the petitioner was an employee under the University or he had discharged the work of University just as an outsourcing staff, has to be decided by the Labour Court. In case, the workman challenges the order of termination passed by the Respondent, the same can be looked into by the Labour Court. In any event, the petitioner has not raised any issue with regard to the violation of the provisions of the Industrial Disputes Act by the employer/respondent, as the fact remains that in the present Writ petition, the petitioner has challenged the rejection of his request for permanent post.

10. It is no doubt true that after amendment, dispute under the Industrial Disputes Act, ought to have been raised in a period of three years with regard to a dispute falling under Section 2-A of the I.D.Act, 1947 and with regard to the dispute falling under Section 2(k) of the Act, no limitation is prescribed and the employee will depend on the Union for raising a dispute seeking permanent job. Even now, the dispute under Section 2-A can be raised under Section 2(k), as the limitation prescribed will not be applicable.

11. The provisions of the I.D.Act, more particularly 25-F of the Industrial Disputes Act, 1947 is very clear that the workman needs to be paid compensation at the rate of 15 days average pay or completed years for every completed year of continuous service or any part thereof in excess of six months. For the sake of brevity, Section 25-F of the I.D.Act, 1947 is extracted below:

"25F - 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 -

(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;"

12. The Hon'ble Supreme Court, in the case of Mohan Lal vs Bharat Electronics Ltd., reported in (1981) II LLJ 70 (SC), had categorically held that termination of service of a workman for any reason other than those excepted in Section 2 (oo) amounts to retrenchment and if prerequisite for a valid retrenchment have not been complied with, the termination of service would be void ab initio. Therefore, the workman would be entitled to a declaration that the workman continued to be in service with all consequential benefits. It was further added that the Workman cannot be retrenched without any notice or notice pay in view of provisions of Section 25F of Industrial Dispute Act.

13. From the above, it is apparent that the Management at the first blush should see whether the Workman has completed 240 days in the year preceding his termination or not and it should also be seen whether 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, failing which, it can easily be presumed that there is a violation of Section 25F of I.D. Act and therefore, the consequential order needs to be followed, which is nothing else than reinstatement and continuity of service and other benefits. It is a well settled law that if the facts require, instead of reinstatement etc., one time lump sum compensation can be granted in the light of the decision in Motors Ltd. vs. T.K.Bhattacharya, reported in 2002 SC 2676.

14. The decision of the Apex Court in the case of Secretary to Government School Education Department, Chennai Vs. R.Govindaswamy and Others reported in (2014) 4 SCC 769, referred to by the Respondent / Management may not be applicable to the facts of the case. It is relevant to point out that in paragraph 8 of the above said decision, it is held as follows:-

"8. This Court in State of Rajasthan Vs. Daya Lal, has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularisation and parity in pay relevant in the context of the issues involved therein. The same are as under: (SCC p.435, para 12)

"(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue

directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right

to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added) "

15. It is pertinent to note here that the above referred case of disengagement from service was taken up and filed before the High Court directly without approaching the Labour Court. It is to be noted that while relying on a judgment, if it is found that the factual situation totally differs, then there is no compulsion for the subordinate courts to blindly rely on the same to arrive at a conclusion, as held by the Hon'ble Supreme Court in the case of Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others, reported in (2002) 3 SCC 533, as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

16. Since the Labour court has got wide powers, it would have come to a different conclusion, as the scope of interference with the punishment by this Court in regard to the charges, which are severe and grave in nature, is very minimal. A Three Judges' Bench of the Hon'ble Supreme Court in the case of *B.C.Chaturvedi vs. Union of India* and others, reported in 1996 AIR 484, had clearly held as follows:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical

rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re- appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

17. At the same time, in yet another case in Hindustan Petroleum Corporation Ltd. And Others vs. Dolly Das, reported in (1999) 4 SCC 450, the Hon'ble Supreme Court had held that High Courts also got ample powers to grant the relief, if the facts are not in dispute, by holding as under:

"9. We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such contract or relief thereof or any other fall out thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the court are of such nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under Article 226 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong."

18. In Central Bank of India vs. S.Satyam and Others, reported in AIR 1996 SC 2526, the Hon'ble Supreme Court, while dealing with a case of violation of Section 25-F of the Act, had taken note of the definition of Section 25-B of the Act, which prescribes the condition precedent for retrenchment and the procedures to be followed together with re-employment of

retrenched person.

19. It is equally important to elucidate here that the Employment Exchange is not the source of recruitment and that paper advertisement has to be given for recruiting eligible candidates and other candidates, who are eligible will have to be given an equal chance to compete with others. The Hon'ble Supreme Court in the case of Excise Superintendent, Malkapatnam, Krishna District, Andhra Pradesh vs. K.B.N.Visweshwara Rao and others, reported in (1996) 6 SCC 216, held that any selection to Government posts should only be by way of publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news-bulletins. For better appreciation, the relevant paragraph of the judgment is extracted hereunder:

"6. Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidates are unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate are deprived of the right to be considered for appointment to a post under the state. Better view appears to be that it should be mandatory for the requisitioning Departments for selection strictly according to seniority and reservation as per requisition. In addition the appropriate Department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news-bulletins: and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

20. In the present case on hand, the documents have been misplaced by the Management and the relevant passage minuted (extracted supra) is evident for such misplacement. Though this is a fit case for granting the relief sought for by the

Petitioner, considering the fact that he was disengaged from service with effect from 18.03.2016 and that he has not challenged the order of his termination, this Court cannot is not in a position to extend its helping hand to the petitioner and therefore, the Writ Petition is liable to be dismissed.

21. Accordingly, the Writ Petition is dismissed. It is made clear that in case the Petitioner raises a dispute either individually or through the Union, the period, during which the writ petition is pending needs to be excluded from the date of filing the petition till the copy of the order is made ready for the purpose of computation of limitation period. It is further made clear that if the Conciliation Officer is unable to bring about a settlement within 45 days, it is open to the petitioner / Union to approach the Labour Court for necessary redressal, after getting a reference made by the Government in a dispute raised by the Union. The observations made herein-above may taken note of by the Labour Court and if the same is applicable while considering the case of disengagement in favour of the petitioner, then the Labour Court has got ample powers to grant reinstatement on permanent basis with all other benefits, if the petitioner fulfils all other criterion and the age factor also needs to be relaxed, more particularly in the light of the decision of the Apex Court in the case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others, reported in (2013)10 SCC 324, wherein it has been held as follows:

"16. The word "reinstatement" has not been defined in the Act and the Rules. As per Shorter Oxford English Dictionary, Vol. II, 3rd Edition, the word "reinstate" means to reinstall or re-establish (a person or thing in a place, station, condition, etc.); to restore to its proper or original state; to reinstate afresh and the word "reinstatement" means the action of reinstating; re-establishment. As per Law Lexicon, 2nd Edition, the word "reinstate" means to reinstall; to reestablish; to place again in a former state, condition or office; to restore to a state or position from which the object or person had been removed and the word "reinstatement" means establishing in former condition, position or authority (as) reinstatement of a deposed prince. As per Merriam Webster Dictionary, the word "reinstate" means to place again (as in possession or in a former position), to restore to a previous effective state. As per Black's Law Dictionary, 6th Edition, "reinstatement" means 'to reinstall, to re-establish, to place again in a former state, condition, or office? To restore to a state or position from which the object or person had been removed.'

17. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

22. It is apposite to narrate that the Apex Court in A.Sunderambal vs. Govt. of Goa, Daman and Diu, reported in (1988) 4 SCC 42 had held that though Educational Institutions fall under the category of Industries, teachers are not Workmen. It is appropriate to point out that the petitioner is not a teacher, but a peon.

23. It is needless to indicate here that whatever observations made hereinabove are only for the purpose of disposal of this writ petition and the the issue, if any

raised by the petitioner before the Labour Court shall be looked into uninfluenced by what is stated herein-above with regard to facts.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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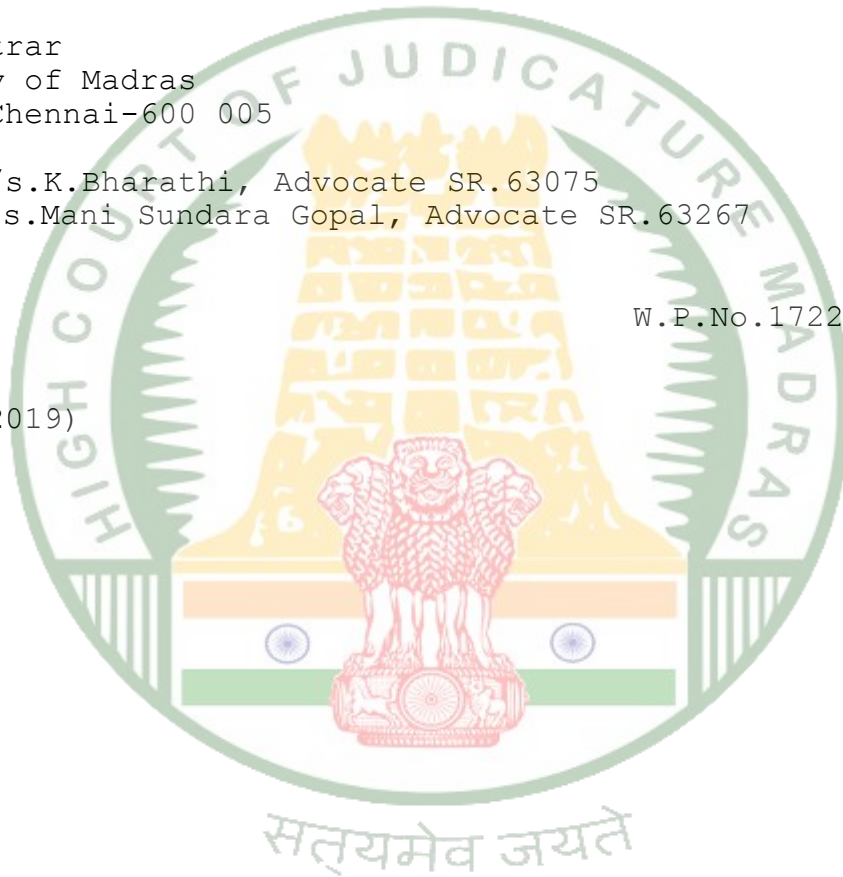
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