

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 27.03.2019

PRONOUNCED ON: 05.04.2019

CORAM

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

W.P.No.33318 of 2018

and

W.M.P.Nos.38659 & 38661 of 2018 & 7011 of 2019

T.Anoop Raaj

.. Petitioner

Vs.

1. The Special Joint Commissioner of Labour,
(Appellate Authority under Tamil Nadu Shops and
Establishment Act, 1947).
Commissionerate of Labour,
DMS Compound,
Teynampet,
Chennai-600 006.
 - 2.The Management,
Gujarat Co-operative Milk Marketing Federation Limited,
rep. by its Managing Director,
Amul Dairy Road,
Anand- 388 001
 - 3.The General Manager,
Gujarat Co-operative Milk Marketing Federation Limited,
No.58, Old No.104, G.N.Chetty Road,
III Floor, T.Nagar,
Chennai-600 017.
- .. Respondents

Petition filed under Article 226 of The Constitution of India praying for issuance of a writ of Certiorarified Mandamus, to call for the concerned records from the first respondent, quash the order of the first respondent dated 21.08.2018 in TNSE-1/1A4/15 as illegal, arbitrary and contrary to law and consequently direct the first respondent to decide the TNSE No.1/19 of 2008 dated 29.08.2008 and pass orders on its merits and in accordance with law.

For Petitioner .. M/s.Balan Haridas

For Respondents .. Mr.Anand Gopalan for

Mr.T.S.Gopalan

ORDER

Writ Petition has been filed seeking for issuance of a Certiorarified Mandamus, to call for the concerned records from the first respondent, quash the order of the first respondent dated 21.08.2018 in TNSE-1/1A4/15 as illegal, arbitrary and contrary to law and consequently direct the first respondent to decide the TNSE No.1/19 of 2008 dated 29.08.2008 and pass orders on its merits and in accordance with law.

2. The facts and circumstances which led to the filing of the writ petition, are stated hereunder:

The petitioner had joined the services of the second respondent in January 1982 as Field Sales Representative. In the year 1991, he was promoted to the post of Junior Executive and further to the post of Senior Executive in December 1997. While he was working as Senior Executive, the second respondent Management issued a letter on 30.07.2008, dismissing the petitioner from service for certain acts of misconduct alleged to have been committed by him as enumerated in the order of dismissal, which are extracted as under:

Sub:Dismissal Order

'You are an officer working as Sr.Executive(Sales) at Chennai Depot. You were also functioning as Depot Incharge(Main Line), Chennai Depot till recently and presently responsible for Hotels and Institutional Sales. Your service is governed by GCMMF Ltd Officers Service Rules. You are well aware that you are responsible for various functions and duties related to Sales and marketing entrusted to you. It has been reported that your performance in sales and marketing activities is very poor and also you have failed to achieve the entrusted job targets. It is also reported that you had a low performance, your reporting is neither productive nor qualitative and your mental block does not allow you to absorb and appreciate suggestions and advices of your superior officer to improve your performance.

It is also reported that you have been committed following misconducts as enumerated in the GCMMF Officers Service Rules.

1.Insubordination of superior and neglect to instructions and advise of superior officers

2.Failure to perform official duties and roles and responsibilities entrusted to you.

3.Failure to perform your duty with integrity and devotion.

4.Negligent in performing of your duty.

5.Interference with work of other employees, spoiling inter personal relation with WD, C & F parties thereby affecting performance of all involved and found negligent in performing your duty.

6.Deliberate delaying the entrusted work and process of carrying out of orders.

It is constrained to note that your past service record and performance is not satisfactory. The details of your past services record and present performance are as under:

1.When you were transferred to Port Blair Depot in the year 1991, you were found negligent in your duty for under-insurance of stocks by 50% and storing our products in other godowns not listed with the insurance company.

2.Your performance in Hubli was very poor with a growth of only, 1.8% during the first half year of 2001-02 as against Zonal growth of 20.7%. Therefore, management has to appoint a new DIC Shri SS Chachad in November 2001 and you were directed to report to the new DIC. You had reused to cooperate to the new DIC and started insubordination with him.

3.You were transferred to many places so that the output that can be expected of an employee/Officer is obtained from you too and to work in interest of Federation. However, in Chennai Depot, your performance was yet again found below expectations and a counselling was conducted in October 2007.

4.We have also observed that you have failed to perform your duty with maximum ability towards the organization. You have contributed negatively by having poor track record as can be seen from various correspondence and counselling notes issued to you by the Zonal in charges of respective Zone from time to time.

5.Further, at present also you are performing poorly, visiting very few Institutions and Hotels. However, Business growth on account of your market visits is minimal. Your APO target achievement is also very poor, having done only 1 APO, though APO is the focus of the Organisation.

Considering your above misconducts and past service record and above all facts, since it is found that it is not in the interest of Federation to continue your services any more. Therefore, as per Rule No.29(2)(d) and 36(ii) of the GCMMF Officers Service Rules, management has decided to terminate your service by way of dismissal from services of Federation with immediate effect keeping the right open to justify the action of dismissal if and when required. You are requested to contact ZAIC, Zone-II, Chennai for settlement of your dues.

3. According to the petitioner, before passing the order of dismissal from service, no enquiry was conducted. Therefore, the petitioner being aggrieved by the unjust order of dismissal, filed an appeal under Section 41 of the Tamil Nadu Shops and Establishments Act (herein after referred to as 'the Act'), before the first respondent assailing the order of dismissal dated 30.07.2008.

4. According to the petitioner, the appeal was filed on 29.08.2008. After dismissal of the petitioner, the management sent a cheque for a sum of Rs.77,529/- on 07.08.2008, towards settlement of his salary till 05.08.2008 and cash value of leave accrued to his credit till 05.08.2008. The petitioner had received the cheque amount and replied to the second respondent management that he will be encashing the cheque without prejudice to the right to file appeal against the order of dismissal, as he was not having any other source of income to sustain himself.

5. Subsequently the third respondent/management, on 19.08.2008 sent another cheque for a sum of Rs.4,37,500/- towards full and final settlement of his gratuity amount till 05.08.2008. At this, the petitioner once again informed the management through E.Mail dated 17.11.2008 that he was accepting the payment without prejudice to his right to continue with the Appeal being preferred by him. This was because in the meanwhile, the petitioner appears to have filed an appeal against the order of dismissal on 29.08.2008.

6. While so, the management once again by a letter dated 24.11.2008, forwarded a cheque for a sum of Rs.4,88,767/- towards a full and final settlement towards his superannuation benefits enclosing the statement of accounts. Even for the said payment of superannuation benefits, it appears that the petitioner has written a letter on 13.12.2008 to the management

stating that he was encashing the cheque to tide over his non employment crisis in order to support his family without prejudice to his right to continue with his Appeal. Thus, the petitioner has encashed all the payments made to him by the management namely salary for the period he worked with, leave encashment benefits, gratuity amounts due till the date of his employment and also the subsequent payments towards superannuation benefits.

7. While matters stood thus, in the proceedings before the first respondent, on behalf of the management a counter affidavit was filed on 05.12.2008. Thereafter, the management on 02.04.2010, filed a memo, seeking permission of the authority to let in evidence since the dismissal of the workman for the alleged acts of misconduct was not preceded by any enquiry. The management filed proof affidavit on 30.08.2012, and thereafter, the management witness (M.W.1) was cross examined on 09.10.2014, 23.12.2014 and 21.04.2015 respectively and was further adjourned for continuation of cross examination. At that point of time, the management has filed I.A.No.4 of 2015 nearly seven years after the dismissal order seeking refund of the amount of Rs.10,03,796/- from the petitioner in order to continue to prosecute the appeal.

8. As according to the management, once the petitioner had received all the amounts due to him including superannuation benefits, he cannot simultaneously prosecute the appeal questioning his order of dismissal and therefore, the management appeared to have filed the IA for refund of the amount received by the petitioner and thereafter, it is up to the petitioner to maintain the appeal before the first respondent authority.

9. On behalf of the petitioner herein, strong objections were raised as to the maintainability of IA filed by the management for refund of the amount received by the petitioner stating that it was clearly intended to protract the proceedings. The said IA for refund of the amount in order to continue to prosecute the appeal was unheard of in the context of Shop Act Appeal and such IA was completely misconceived. According to the petitioner, a detailed written arguments were submitted and the authority was impressed upon to dismiss the IA as not maintainable and also not to pass any order as a measure of preliminary issue, since as that would involve piece meal adjudication. On behalf of the management, it was contended that the petitioner cannot be allowed to enjoy the amounts paid to him including superannuation benefits and cannot be allowed to prosecute the appeal simultaneously. According to them, the moment the petitioner had accepted the amounts paid by the management and encashed the same, it would be amounting to acquiescence and cessation of service and

therefore, it was not open to the petitioner to maintain the appeal after encashing the amounts paid to him by the management. The learned authority by his order dated 21.08.2018 has allowed the IA filed by the management by directing the petitioner herein to refund the amounts paid to him by the management in order to pursue the appeal further. According to the first respondent authority, the petitioner herein cannot keep the amounts paid by the management as long as the appeal is pending. The said order passed by the first respondent is the subject matter of challenge in this writ petition.

10. Mr. Balan Haridoss, the learned counsel appearing for the petitioner would submit that the IA filed by the management and the order of the first respondent, allowing the IA, is inconceivable since such a prayer could not be entertained by the first respondent, as the first respondent is not vested with any power to frame any preliminary issue of this kind. Therefore, the order passed by the first respondent is liable to be interfered with on the ground that the IA filed by the management itself is not maintainable in law.

11. On merits, the learned counsel for the petitioner would submit that every time when the amount was sent by the management i.e., on three occasions, the management was informed in writing by the petitioner herein that the cheques were being encashed without prejudice to his right to contest and maintain the appeal challenging his order of dismissal. In fact, three communications in this regard were sent by the petitioner dated 11.08.2008, 17.11.2008 and 13.12.2008 respectively. This fact has not been disputed by the management. In fact, according to the learned counsel for the petitioner, that the petitioner himself has written a detailed letter on 03.01.2009 to the management stating that he was willing to return the amounts paid to him provided his termination/dismissal was revoked by the management and he be reinstated in service. Therefore, the petitioner had expressed his intention to work and gain his salary, but it was the management which illegally dismissed him from service without even conducting an enquiry. According to the learned counsel for the petitioner, the management has not even spelt out any reasons for not conducting an enquiry against him before the order of dismissal was passed.

12. The learned counsel for the petitioner would submit that after the management witness was subjected to cross examination for some time on three occasions, sensing that the management would not be able to justify its action in dismissing the petitioner from service, the management devised a ploy and filed the IA for refund of the amount received by the petitioner just to prolong the appeal pending before the first respondent

and also to frustrate the petitioner from getting any relief at the hands of the first respondent. The learned counsel further submitted that once the payments received by way of cheques, were encashed under protest, the petitioner has not given up his right to prosecute the appeal and in such event, the first respondent ought to have rejected the IA, filed by the management. However, unfortunately, the first respondent without even referring to the detailed submissions made on behalf of the petitioner and also without reference to the written arguments, has passed a cryptic and non speaking order.

13. In any event, the order passed by the authority that unless the amount received by the petitioner is refunded, the appeal will not be proceeded is without jurisdiction, as the scope of the powers vested under the provisions of the Act is limited. As such order is never envisaged in the scheme of the Act.

14. In support of his contention, the learned counsel for the petitioner would rely on the following decision reported in 1986 SCC OnLine Mad 150 in the case of "Chandra Textiles (Private) Ltd., Coimbatore Vs. N.Palaniswami and Others). The learned counsel for the petitioner would relay on paragraph nos. 18 to 20 of the aforesaid judgment, which are extracted here under:

"18.Mr. Venkataraman, learned counsel for the first Respondent, referred to the definition of the words, "under protest" in the Law Lexicon of Venkataramiah, Vol. II. Besides that, he referred to "Supdt. (Tech, I) Central Excise, I. D. D., Jabalpur v. Pratap Rai" (1978) II S.C.J. 490 which has considered the meaning of the words, "without prejudice". In the view which we have taken on the facts of the case, it is not necessary for us to consider those decisions. We rest content by pointing out that the conduct of the first respondent is not one from which it can be inferred in any matter that he had accepted the award of the Labour Court to be correct. On the other hand, he was been unequivocally pointing out the other way.

19. In the view which we have taken on the facts of this case, the authorities relied upon by the learned counsel for the appellant will not apply to this case. Each case will have to depend on its own facts. In the present case, the conduct of the appellant was not such that he became disentitled to the discretionary relief under Article 22 of the Constitution of India by the doctrine of approbation and reprobation or any

other principle of law. The decisions cited by learned counsel for appellant will not help him in the present case.

"20. We do not agree with the contention of learned counsel for the appellant that the principle of accord and satisfaction would apply to this case. The doctrine of accord and satisfaction is that, where there is a subsisting unilateral obligation by which A is bound with reference to B to do a particular act as paying money or delivering a chattel, A, instead of doing the act, may with the consent of B, do some other act or deliver some other thing and this will operate to satisfy the existing obligation. Scrutton, L.J., in *British Russian Gazette v. Associated Newspapers Ltd.* (1933) 2.2 AB. 616, points out :

"Accord and satisfaction is the purchase and release from the obligation arising under a contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative"

15. According to the learned counsel for the petitioner, the issue of 'accord and satisfaction' would not arise in the relationship between the employee and the management particularly, when the employee encashed the payments under protest.

16. the learned counsel for the petitioner would also rely on the following decision reported in (1978) 3 SCC 113 in the case of *Superintendent(Tech.I) Central Excise, I.D.D. Jabalpur and Others Vs Pratap Rai*)". The learned counsel for the petitioner would draw the attention of this Court in regard to the etymology of the term 'without prejudice' as held by the Hon'ble Supreme Court of India. Relevant portion of the afore cited decision of the Hon'ble Supreme Court of India is extracted here under:

'The term 'without prejudice has been defined in Black's Law Dictionary as follows :

"Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration

that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See.. also, Dismissal without Prejudice".

Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:

"The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offer, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment."

'The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties-not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean not affection', 'saving' or 'excepting'".

7. In short, therefore, the implication of the term 'without, prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred. It is true that the Appellate Collector does not say in so many words that the case is remanded to the Assistant Collector but the tenor and the spirit of the order clearly shows that what he intended was that fresh proceedings should be started against the respondent after complying with the rules of natural justice. Thus, in our view a true interpretation of the order of the Appellate Collector would be that the order of the Assistant Collector was a nullity having violated the rules of natural justice and having been vacated the

parties would be relegated to the position which they occupied before the order of the Assistant Collector was passed. In this view of the matter the Assistant Collector had ample jurisdiction in issuing the notice against the respondent in order to start fresh adjudicatory proceedings in accordance with law.

The learned counsel for the petitioner would submit that the implication of the term 'without prejudice' means that the cause was not decided on merits.

17. The learned counsel for the petitioner would also rely on the decision of a learned Single Judge of this Court in the case of The Chairman & Managing Director, Indian Bank, Chennai Vs. The Presiding Officer, Central Government Industrial Tribunal cum Labour Court, Chennai and Another). The learned counsel for the petitioner would rely on the observation of the learned Single Judge in paragraph.no.7 of the judgment supra, in regard to the framing of preliminary issue at a belated stage in the proceedings. Paragraph no.7 of the order of the learned Single Judge cited supra is extracted here under:

'7. It is true that the Division Bench of this Court, relying upon the judgment of the Honourable Apex Court, has stated that all the issues can be decided at the final stage. Once an issue is taken up as a preliminary issue, the very nomenclature says that it is a preliminary issue and without going through the enquiry or trial, it is expected to decide the issue before the trial. If the preliminary issue is decided in favour of the original petitioner, then only the proceedings can be taken to the next step. Thus, unnecessary enquiry/trial can be avoided. In any event, in this case, the proof affidavit was filed by the 2nd respondent Union and the counter affidavit was filed by the petitioner in 2015 itself and when the matter was posted for cross-examination of the 2nd respondent in February, 2016, the petitioner merely filed I.A. No. 100 of 2016 on 5th April, 2016. This is nothing but an attempt, on the part of the petitioner, to prolong the matter. If the petitioner Management is so serious about jurisdiction, then, they should have been

vigilant enough to file a petition, in regard thereto, even before filing their counter statement. Therefore, it is too late in the day, for the petitioner to raise a preliminary issue at this stage. This Court finds no reason to interfere with the impugned order passed by the 1st respondent Tribunal. Hence, the writ petition fails and the same is dismissed. The 1st respondent is directed to dispose of I.D. No. 67 of 2015 within a period of three months from the date of receipt of a copy of this order. No costs. Connected W.M.P. is closed.''

18. In the light of the above factual and legal submissions, the learned counsel for the petitioner would submit that the order passed by the first respondent dated 21.08.2018, is liable to be struck down as being illegal and void.

19. Per contra, Mr. Anand Gopalan, the learned counsel for the respondent management, would submit that there was nothing wrong in the order passed by the first respondent, on a preliminary issue framed by him at the instance of the management. The power for framing such preliminary issue is inherent in the authority under the provisions of the Act. According to the learned counsel for the management that it was not a mere part payment which was given to the petitioner and the same was encashed by him under protest. In fact, the petitioner was paid superannuation benefits also to the tune of Rs.4,88,767/- on 24.11.2008 and this was also encashed by the petitioner.

20. According to the learned counsel for the management, the petitioner was clearly informed by the management that in case of encashment, he would be accepting cessation of employment and he cannot have both vide their letter dated 29.11.2008. In fact, by further communication dated 29.12.2008, the petitioner was informed by the management that the management would question the maintainability of the appeal so long as the petitioner retained the amount paid to him and therefore, left the matter to the petitioner to decide as to what to do in the matter. Therefore, the petitioner was very much aware that even as early as during November and December 2008, as the petitioner was very clearly informed by the management about the intention of the management questioning the maintainability of the appeal.

21. The learned counsel for the respondent management would further submit that since the petitioner did not return the amounts, the management was forced to file the IA for

refund of the amount in order to maintain the appeal by the petitioner on 19.05.2015. The first respondent, after having adverted to the various submissions made by the parties, has come to the conclusion that the demand of the management was justified and therefore directed the petitioner to refund the amount paid to him in order to prosecute the appeal further, by allowing the IA filed by the management. According to the learned counsel for the management, the petitioner was employed abroad during the period of his non-employment and therefore, the prosecution of the appeal was also delayed because of the said fact. This was strongly objected to by the learned counsel for the petitioner stating that the delay was only due to the conduct of the management in filing a memo to let in the evidence after two years and thereafter, filing proof affidavits after another two years in 2010 and 2012 respectively.

22. The learned counsel for the management would therefore submit that the authority is well within their power to decide the preliminary issue since the acquiescence of the petitioner by accepting all payments including superannuation benefits has to be decided before the appeal is to be maintained. The learned counsel, in support of his factual and legal submissions would rely on the following two decisions reported in (2011) 14 SCC page 662 in the case of Man Singh Vs. Maruti Suzuki India Limited and Another); and "(2016) SCC OnLine SC 404 in the case of Rajibhai Bhikhabhai Parmar and Others Vs. Reliance Industries Ltd., and Another)". In the first decision cited supra, the Hon'ble Supreme Court of India has held that though the employee who contested his retirement under VRS Scheme, the amount received under the scheme has to be refunded. Therefore, it is nothing strange about such course adopted by the authority concerned.

23. On the same line, the learned counsel relied on the decision of (2016) SCC On-Line SC 404 cited supra. The Hon'ble Supreme Court in this case has ordered deposit of VRS amount received by the employee, for the Labour Court to decide the references. Therefore, the learned counsel would submit that the refund of the amounts by the employee can be ordered in certain circumstances and therefore, the order passed by the authority herein cannot be called into the question as being completely without the authority of law. He would in any event submit that it is not open to the petitioner to unjustly enrich himself by enjoying the superannuation benefits and at the same time question his dismissal order. Therefore, he would urge this Court to dismiss the writ petition and uphold the order passed by the first respondent dated 21.08.2018.

24. Heard, the submissions of the learned counsels appearing for the petitioner as well as the respondent

management and perused the materials and pleadings placed on record.

25. The crucial point for consideration before this Court, as to whether the first respondent authority is vested with the power to frame a preliminary issue in respect of the subject matter of the present nature and allow the plea of the management not to proceed with the appeal filed by the petitioner. Before going into the inter se merits of the contending parties, this Court has to take a call whether the first respondent authority had rightly entertained the IA filed by the management within the frame work of the provisions of the Act. The maintainability of such IA filed by the management can be looked into in two different ways. One is that whether such IA is maintainable at all under all circumstances and whether it is open to the authority to frame a preliminary issue and render the findings, even assuming such IA is maintainable.

26. In regard to the first issue is concerned, though on behalf of the management, strenuous arguments were advanced that the power to decide such IA is inherent in the authority under the scheme of the Act, this Court has to necessarily examine whether such power is traceable to the scheme of the Act. The learned counsel for the management despite his argument in this regard about the inherent power being enjoyed by the authority, was not able to point any particular provision as contained in the Act envisaging such scope for the authority to entertain the IA filed by the management for refund of the amounts received by the employee before proceeding with the appeal. The inherent power cannot be recognized in a statutory vacuum and such power could be recognized only in the entire scheme of statute under which the power has been exercised by the authority concerned. In this case, this Court is unable to appreciate as to how the first respondent would entertain the IA and insist on the petitioner to refund the amount for him to maintain the appeal any further, particularly, when such scope of preliminary interference of the authority is not provided in the scheme of the Act. In short, the action of the first respondent in entertaining the IA filed by the management is alien to the scheme of the Act and therefore, the impugned order passed by the authority is liable to be interfered with on this ground alone. The power to entertain such IA has to be traced with reference to the provisions of the Act and this Court is unable to find any such power embodied in the Act in order to uphold the maintainability of such IA by the first respondent.

27. As regards the second issue is concerned, even assuming for a moment that the IA is maintainable, the authority ought

to have tried the IA, along with the main appeal and ought to have passed composite order as held by the Hon'ble Supreme Court in several decisions. A preliminary issue of this nature if adjudicated and findings rendered, it will only give rise to protraction of the pendency of appeal before the authority and that will ultimately ennure to the benefit of the management as against the interest of the employee. Therefore, the first respondent ought not to have rendered findings on the preliminary issue by allowing the IA and refusing to proceed with the appeal. Such course adopted by the first respondent is contrary to the legal principles as laid down by this Court and the Hon'ble Supreme Court. Therefore, this Court is of the view that the decision rendered by the authority on the preliminary issue cannot be countenanced in law and therefore, on this ground also the order passed by the authority is liable to be interfered with.

28. Be that as it may, in regard to the merits of the submissions made on behalf of the petitioner as well as the management, it is unequivocally established on behalf of the petitioner that three payments were made on 07.08.2008, 19.08.2008 and 24.11.2008 respectively and the petitioner had clearly informed the management that he was encashing the cheques only under protest that too to sustain himself during the period of his non-employment and without prejudice to his right to prosecute the appeal filed against his dismissal from service by the management. Therefore, it could be conclusively held that the petitioner by a reason of encashing the cheques alone has not given up his right to prosecute the appeal against the management. No doubt, in the bargain, the petitioner has also encashed the superannuation benefits, which were paid to him on 24.11.2008 to the tune of Rs.4,88,767/-. Nevertheless, the petitioner even at that instance informed the management that he was forced to encash the payments for his livelihood. The cases relied on by the learned counsel for the petitioner as extracted above would support the case of the petitioner that whenever such payments were accepted without prejudice, the beneficiary of such payments cannot said to have given up his right to proceed against the management.

29. Although, on the side of the management, they have taken steps to inform the petitioner at least on two occasions, i.e., one on 29.11.2008 and another on 29.12.2008 that the maintainability of the appeal would be questioned as long as the petitioner retained the amount paid to him, but such warning by the management cannot take away the petitioner's statutory right to prosecute the appeal. Encashment of cheques cannot take away the statutory right of the petitioner to prosecute the appeal under the Act. Much emphasis has been laid on the acquiescence and the estoppel on the part of the petitioner but

in the realm of statutory right conferred on the employee, the plea of acquiescence or estoppel will not operate against the petitioner. Much was said by both sides about the needless adjournments taken to protract the proceedings, however, this Court does not wish to go into such controversies, as frequent adjournments are always common in legal proceedings and therefore, this Court is not inclined to blame either party for the delay.

30. Howsoever, the fact of the matter is that it has taken nearly seven years for the management to file the present IA in the year 2015, seeking refund of the amount, when admittedly the amounts were paid to the petitioner and encashed in the year 2018 itself. Although, the letters were issued by the management to the petitioner in 2018 itself as afore mentioned, about the questioning of maintainability of the appeal by the management, the management for what ever reasons has not moved the authority by filing any IA at a preliminary stage of the hearing and has waited for several years and moved the authority with the present IA. Therefore, the conduct of the management in this regard has is questionable and ostensibly the IA has been filed in order to achieve a collateral purpose. In any event, by payments made to the petitioner including the superannuation benefits, no prejudice was caused to the management, since the same can always be justified on the basis of the outcome in the appeal to be decided by the first respondent. This Court can understand the frustration on behalf of the management that the petitioner was allowed to enjoy all cash benefits including the superannuation benefits and was proceeding against the management. But at the same time, the management cannot be allowed to frustrate the attempt of the petitioner to vindicate his stand against the alleged acts of misconduct attributed to him by the management.

31. Moreover, the manner in which the impugned order was passed by the first respondent has to be looked into. The first respondent has not referred to the objections raised on behalf of the petitioner herein and in fact, the entire order is bereft of any reasons except stating that the IA filed by the management has been allowed and the appeal will not be proceeded further. Such approach by the first respondent, who was exercising quasi judicial function does not augur well for the authority dealing with the appeal under Section 41 of the Act. When a decision is rendered on an important preliminary issue like this, even assuming that he can render preliminary findings under the provisions of the Act, the decision must be accompanied by the supportive materials and reasons. A decision without reasons vitiate the entire proceedings itself. In this case, unfortunately the authority has not come out with any reasons at all for allowing the IA. Therefore, even on

merits, the order passed by the first respondent has to be set aside as the same cannot either be countenanced in law or on facts.

32. The decisions cited on behalf of the learned counsel for the management may not be of much help to him for the simple reason that both the decisions of the Hon'ble Supreme Court of India were in relation to retirement under VRS scheme and when such retirement was questioned by the employees, the benefit taken under the VRS Scheme was ordered to be returned. The principle as laid down in those cases cannot be applied to the factual matrix of this case. As far as the present case is concerned, it is an order of dismissal from service and the management on its own paid three payments to the petitioner representing various benefits admissible to him and such payments were received on encashment by the petitioner under protest and without prejudice. Therefore, in such circumstances, it is not open to the management even on merits to file the IA for return of the amount paid to the petitioner that too at the belated stage of the appeal herein, after a lapse of seven years.

33. Viewed from in any angle, the order impugned in this writ petition cannot be upheld as the first respondent has committed a grave error in law in entertaining the IA in the first place and allowing the same and refusing to proceed with the appeal filed by the petitioner herein unless refund of the amount by him. The refusal of the first respondent in proceeding with the appeal on the stated ground would amount to dereliction of statutory responsibility cast upon him under the provisions of the Act and hence the order passed by the first respondent has to go lock, stock and barrel.

34. For the above said reasons, this Court finds that the order impugned in the writ petition, passed in IA dated 21.08.2018 is unsustainable in law. Therefore, the same is hereby set aside. The first respondent is directed to dispose of the appeal on merits and in accordance with law within a period of six months from the date of receipt of a copy of this order.

35. The writ petition is therefore, allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

dn

To

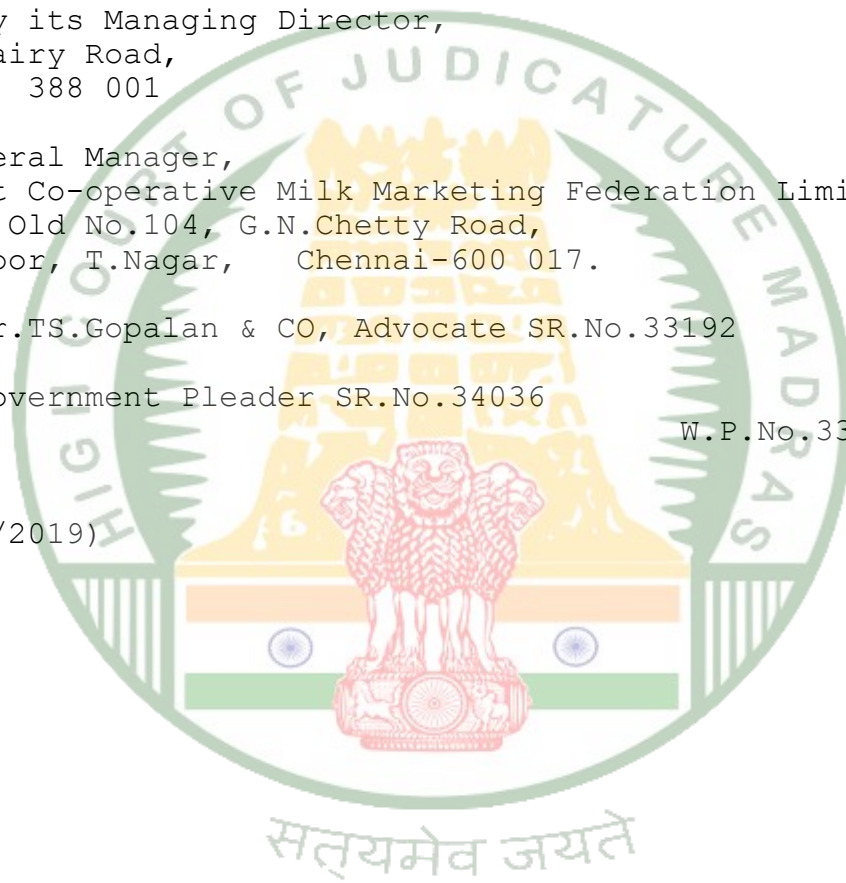
1. The Special Joint Commissioner of Labour,
(Appellate Authority under Tamil Nadu Shops and
Establishment Act, 1947).
Commissionerate of Labour,
DMS Compound,
Teynampet,
Chennai-600 006.
- 2.The Management,
Gujarat Co-operative Milk Marketing Federation Limited,
rep. by its Managing Director,
Amul Dairy Road,
Anand- 388 001
- 3.The General Manager,
Gujarat Co-operative Milk Marketing Federation Limited,
No.58, Old No.104, G.N.Chetty Road,
III Floor, T.Nagar, Chennai-600 017.

+1cc to Mr.TS.Gopalan & CO, Advocate SR.No.33192

+1cc to Government Pleader SR.No.34036

W.P.No.33318 of 2018

GJ(CO)
GMY(22/05/2019)



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