



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

W.P.No.13113 of 2004

The Management
Toshniwal Instruments (Madras) Private Ltd
P-16, Ambattur Industrial Estate
Chennai-600 058.

... Petitioner

Vs.

1.The Presiding Officer
Principal Labour Court, Chennai

2.D.Sagayadoss

... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records of the 1st respondent in its Award in I.D.No.706 of 1997 dated 24.11.2003, quash the same.

For Petitioners : Mr.R.Parthiban

R1 : Court

For Respondent 2 : Ms.A.Amalraj

O R D E R

This writ petition has been preferred against the award of Labour Court ordering reinstatement of the 2nd respondent with continuity of service, backwages and all other attendant benefits.

2. The 2nd respondent was employed by Writ petitioner/Management. The 2nd respondent raised the dispute u/s. 2 A (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act'). According to him he was appointed as Service assistant under the writ petitioner company. He was laid off from 07.04.1995 to 11.04.1995 and from 07.08.1995 to 05.09.1995. Even though the company has engaged juniors and casual labours to continue the work, with an ulterior motive, to



victimise the 2nd respondent by continuing the layoff, the petitioner company has terminated the 2nd respondent from service. The termination is illegal and amounts to anti labour and unfair labour practices and violation of principles of natural justice.

3. Before the Conciliation officer, the writ petitioner company has falsely filed a reply that the 2nd respondent was given promotion and he abandoned to join duty and therefore there is no question of termination or retrenchment. The action of the management is violative of Sec. 2(oo) and 25-F of the Act. Only with a view to victimise the 2nd respondent, the promotion was given as supervisor and by which he cannot claim the benefits as worker under Industrial Disputes Act. He has clearly stated that he refused to accept the promotion and willing to work as service assistant.

4. The writ petitioner filed a counter stating that the 2nd respondent was employed as service assistant. The services department was merged with production department as the sales was so dull and company met with financial crisis. The junior most employee of the service department was retrenched from service and thereafter two other juniors to the 2nd respondent were also retrenched. In so far as the 2nd respondent is concerned, he was offered promotion in one vacancy fell to the post of supervisor. Since he was not willing to accept the promotion he was laid off from 08.08.1996. Even during the Conciliation proceedings as well as before the Labour Court, the writ petitioner management had taken a stand that the 2nd respondent was not retrenched or terminated and he can always join duty as supervisor. Since the 2nd respondent was not retrenched or terminated, Sec.2(oo) and 25-F of the Act would not be attracted. The dispute raised by the 2nd respondent is not at all maintainable as he was neither retrenched nor terminated. He refused to take up employment as he was gainfully employed elsewhere.

5. On the side of the 2nd respondent he examined himself as W.W.1 and marked Exs.W.1 to W.23. On the side of the management one Sethuraman was examined as M.W.1 and Exs.M.1 to M.13 were marked.

6. After discussing the evidence, the Labour Court had come to a conclusion that the admissions made by M.W.1 proves that management retrenched the 2nd respondent due to some motive. Mandatory requirements specified under Sec.25 F was not followed that the 2nd respondent had not abandoned the services, but he was prevented from joining duty and ordered reinstatement with continuity of service, backwages and other attendant benefits.



7. I considered the rival submissions.

8. It has to be analysed as to whether the Labour Court considered the relevant materials and came to a right conclusion or not?

9. The admitted facts remain that the writ petitioner M/s. Toshniwal Instruments (Madras) Pvt. Ltd was amalgamated on 23.06.1995 with another company called TOVAC Equipments Pvt Ltd. It is stated that the amalgamation had taken place due to severe financial crisis on account of a steep drop in sales faced by the TOVAC Equipments Pvt Ltd. Therefore, the service department of the petitioner company was closed and merged with production department. The 2nd respondent was originally appointed as Service Assistant and claims that he should have been treated as production assistant. It is also an admitted fact that 3 persons were employed in service department and at the first instance, one of the junior most staff was retrenched from service on 02.03.1995 and thereafter two other junior persons were retrenched on 14.06.1995 and 08.04.1996. The 2nd respondent was offered the post of supervisor, which fell vacant at the relevant point of time, but he refused to accept the offer and wanted to continue as worker by his letter dated 29.06.1996. The petitioner company vide Ex.W.16 dated 07.08.1996 laid off of the 2nd respondent with effect from 08.08.1996. The 2nd respondent raised a dispute through the Union u/s. 2 K of the Act on 04.09.1996. Since the Union was de-recognised by the petitioner management, 2nd respondent had withdrawn the dispute and raised the present dispute on 07.04.1997. Before the Conciliation officer and Labour Court, the management has filed a reply statement offering him employment as supervisor and denied the claim of the 2nd respondent that was retrenched/ terminated. Even though, the 2nd respondent has raised an issue that even after laying him off from service, the management engaged juniors as well as casual workers in service department. When a person asserts a positive statement it is for him to prove the same. In the instant case, inspite of making a statement that the management has employed employees junior to the 2nd respondent and engaged casual workers in service department, he has failed to prove the same by suitable evidence. On the other hand available evidence goes to show that the service department was closed. The Labour Court without considering available evidence on extraneous assumption has held that due to some motive the 2nd respondent was made as an victim. The motive attributed against the management is not specific and not supported by any evidence on the side of the worker, but finding pit falls in the evidence of M.W.1. Hence the finding given by the Labour Court on this aspect is perverse.



10. As stated supra, at all stages, management had offered employment in a higher post viz., Supervisor with higher emoluments. The 2nd respondent had refused to accept the offer, but expressed his option to continue as Service assistant. The material available before the Labour Court reveal that the service department was closed and all the employees except the 2nd respondent were retrenched and he was laid off. When the employee refuses to take up the employment offered, even without prejudice his rights, he will not be entitled to backwages. Further not taking steps to resume duty or keeping silence with demanding employment for a long period will lead one to infer that he had abandoned his service and as claimed by the management, gainfully employed else where. In such circumstances it cannot be construed as retrenchment and the finding of the Labour Court that the worker has not abandoned duty and not permitted to join duty is contrary to the evidence available. Even assuming the 2nd respondent was retrenched, there is no specific finding from when he was retrenched and whether it amounts to termination as claimed by the workmen. Therefore the order of reinstatement without proof retrenchment is patently erroneous and illegal.

11. The Bombay High Court in the case of Sonal Garments vs Trimbak Shankar Karve, 2003 (1) L.L.N. 91 has held that workmen will not be entitled to get backwages, when the management offers any employment. The positive action on the part of the workmen should be that he accepts to take reinstatement but inspite of the same he was not given work.

12. The Bombay High Court has held as under:

".....

3. The Award of full backwages, however, is totally erroneous. The Labour Court has not at all considered the offer of the petitioner employer in the written statement that the respondent workman, if really, interested to resume duties, could do so. In my opinion, the respondent workman will not be entitled to get the backwages from the date of the written statement as it appears that there was no response from the respondent workman and that he did not report for work at all. Had he reported for work after the written statement was filed, he would have definitely stated so in his oral evidence which was recorded on 3rd September, 1994 to say that he had reported for work but he was not taken back as stated in the written statement. The respondent workman is absolutely silent on that point. It is,



WEB COPY

therefore, clear that the respondent workman did not accept the offer of reinstatement given by the petitioner employer in his written statement. At the time of admission of the petition, this Court had granted rule only to the extent of backwages. There was no rule on the reinstatement.

4. However, as the offer of petitioner to reinstate the respondent was not accepted, he is not entitled to the relief of reinstatement and any backwages at all. His conduct lends support to the version of the employer that he had abandoned the employment and that he never came back to report for duty and that it was not a case of termination by the petitioner employer. Whenever the employer offers to reinstate the workman at any stage of the dispute or proceeding and if the workman does not accept the offer even without prejudice to his rights and contentions he will not be entitled to continue his claim for reinstatement in the proceedings and he will also be not entitled to claim any backwages from the date of such offer, conditional or unconditional. He must first accept the offer and get reinstated in employment and therefore continue to contest for the relief of back wages, if any. In the present case there was an unconditional offer of reinstatement made by the employer in the written statement itself but it was not accepted by the workman. Therefore, as stated by me hereinbefore, he is not entitled to get reinstatement with full back wages at all."

13. In the instant case, the 2nd respondent has not taken up employment without prejudice to his rights. The said judgment was followed in the case of Suja Agencies vs Uday Singh B. Rawat, 2003 (4) LLN 1218, wherein it has been held as follows:

" In the circumstances, considering the fact that the workman failed to avail the opportunity offered by the petitioners, the workman would not be entitled to saddle the employer with back wages for his own fault and own failure to report to the duties in spite of the unconditional offer being made by the employer. It is also a matter of record that from 3-3-1990 to 9-9-1992 the workman was gainfully employed with another employer. In the circumstances, therefore, the petitioners are justified in contending that there is no justification for grant of back wages from 24-3-



WEB COPY

1992 onwards. Considering the finding arrived at by the Labour Court regarding the termination of the services and the subsequent reinstatement of the workman and the workman having been gainfully employed from 3-3-1990 to 9-9-1992 and the case of the workman being that his services were terminated from 27-1-1990, the period for which the workman would be entitled to claim the back wages will be from 27-1-1-990 to 3-3-1990."

14. In the instant case, from the beginning the management has offered employment to the 2nd respondent/worker. But he has not taken up the same even without prejudice to his rights. Therefore, it should be construed that he has abandoned the service and the long absence as held by the above judgments, will amount to resignation and it will not amount to retrenchment. Further, for the purpose of denying the last drawn wages u/s.17-B of the Act, the petitioner has made a specific statement that the 2nd respondent had started a proprietorship concern viz Prabivac Instruments having office at Avadi, Chennai with its phone number, fax number and TNGST registration. To this, the 2nd respondent filed a counter admitting that the company was started and license was obtained in his name, considering his long experience and expertise in the field. The investment was made in his name and run by his friends and he has neither invested any money nor gained anything. The admission as such prove that the 2nd respondent is gainfully employed. Further, he has withdrawn the provident fund in 2004 and other benefits like bonus etc., from the employer much earlier than that. But the 2nd respondent has not come out with all these material facts before the Labour Court. Even though it was stated by the writ petitioner that the company was started in 2001, the petitioner has not come out with honest disclosure as to when it was started and that it will not amount to gainful employment. Non disclosure of material facts by itself will automatically dis-entitle the 2nd respondent to any equitable relief and backwages for that purpose.

15. For arriving at its finding, the Labour Court has simply quoted that the management witness M.W.1 has admitted that the 2nd respondent was retrenched. But a perusal of the evidence does not disclose any such admission as to retrenchment from service by the management. Even the 2nd respondent claim that the long lay off amounts to retrenchment or termination of his service. In that event, the award passed by the Labour Court without any material evidence by itself is perverse and not sustainable in the eyes of law. Accordingly, the award passed in I.D.No.706 of 1997 dated 24.11.2003 on the file of the 1st respondent is set aside.



Writ petition is ordered accordingly. No costs.

WEB COPY

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Presiding Officer,
Principal Labour Court,
Chennai.

W.P.No.13113 of 2004

nr[col
srg 09/07/2020