

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 17.07.2020
ORDERS PRONOUNCED ON : 02.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.39992 of 2005

P.Pachamuthu

...Petitioner

vs.

1. The General Manager,
Tamil Nadu State Transport Corporation,
(Salem Division I) Limited,
12, Ramakrishna Salai,
Salem - 636 007.
 2. The Managing Director,
Tamil Nadu State Transport Corporation,
(Salem Division I) Limited,
12, Ramakrishna Salai,
Salem - 636 007.
 3. The Labour Inspector-cum-Inspector,
under Tamil Nadu Industrial Establishments,
(Conferment of permanent status to workmen) Act,
Salem.
- ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus to direct the first and second Respondents herein to provide employment to the Petitioner herein as Driver in the Respondent Corporation and consequently to direct the first and second Respondents herein to implement the order of the third Respondent herein in his proceedings No.Aa/993/2001, dated 31.03.2005 insofar as the Petitioner is concerned.

For Petitioner : Mr.G.Purushothaman
For Respondents 1 & 2: Mr.B.Raghu

O R D E R

Petitioner has come up with this Writ Petition seeking a direction to the 1st and 2nd Respondents herein to provide him employment as 'Driver' in the Respondent/Transport Corporation and for a consequential direction to the 1st and 2nd Respondents to implement the order dated 31.03.2005 passed by the 3rd

Respondent vide proceedings No.Aa/993/2001, insofar as he is concerned.

2. According to the Petitioner, he studied upto 9th standard and obtained a Heavy Motor Vehicle Driving License from the Authorities concerned. He registered for employment before the District Employment Office, Salem on 27.01.1987 and his employment seniority was renewed periodically. The 2nd Respondent herein by letter dated 07.10.1997, directed the Petitioner for an interview for the post of 'Daily Rated Driver' in the Respondent/Transport Corporation. The Petitioner attended the interview held on 18.10.1997 and got selected. His daily wages was fixed at Rs.98/-.

3. Thereafter, the 1st Respondent, by his letter dated 02.12.1997, directed the Petitioner to appear before him on 27.01.1998 with his Driving License and pay a sum of Rs.1500/- as training charges. Accordingly, the Petitioner paid the said amount and performed his duties as Driver (Daily Rated-Monthly Paid) continuously, without any break in service.

4. It is further stated by the Petitioner that, in the year 2000, all the Drivers and Conductors working on Daily rated-monthly paid basis in the Respondent/Transport Corporation formed a Union. In order to espouse the demands of the Drivers and Conductors, the Union preferred a Writ Petition in W.P.No.13615 of 2000 before this Court to regularize the services of the members of the Union in the Respondent/Transport Corporation in the permanent vacancies.

5. Accordingly, the Petitioner along with 32 others approached the 3rd Respondent herein to regularize their services under Section 3 of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981, (hereinafter referred to as '1981 Act'), as all of them have completed more than 480 days within a period of 24 calendar months.

6. The Petitioner went on to state that, he produced 16 documents before the 3rd Respondent to show that, he is in service for more than 480 days within a period of 24 calendar months. However, the Respondent/Transport Corporation did not produce any records to refute the Petitioner's documents as well as his position. During the pendency of the above proceedings, the Petitioner was orally terminated from service, without complying with the mandatory provisions under Section 25(F) of the Industrial Disputes Act. According to the Petitioner, he was not served with any notice and no reason was assigned for the termination, when he had worked for about five years without any break in service and blemishes.

7. While so, the 3rd Respondent herein, who is the Authority under the 1981 Act, after careful consideration of the material records available, vide order dated 31.03.2005, ordered regularization of the Petitioner's service on completion of 480 days within a period of two years from the date of joining duty in the Respondent/Transport Corporation.

8. The grievance of the Petitioner is that, even though, the 3rd Respondent has passed the order of regularization on 31.03.2005, the 1st and 2nd Respondents herein have so far not implemented the above order and that, challenging the said order, no Writ Petition was filed before this Court. However, without complying with the said order dated 31.03.2005, the Respondent/Transport Corporation has resorted to appoint fresh candidates, which is in violation of Section 25(H) of the Industrial Disputes Act.

9. The 2nd Respondent has filed Counter Affidavit, wherein, it is stated that, the Petitioner has to prove his services of 480 days in the Respondent/Transport Corporation in two years, since the burden of proof lies on the Petitioner, as per the principles laid down by the Apex Court in the case of Forest Range Officer vs. S.T.Hadimani (2002 (2) LLN 391).

10. But, the 3rd Respondent passed a common order dated 31.03.2005 to regularize the services of the Petitioner from the date of completion of 480 days of his services. Challenging the said order, the Respondent/Transport Corporation filed W.P.No.39322 of 2005. However, the said Writ Petition was dismissed on 28.04.2006. According to the 2nd Respondent, as the Petitioner and others did not provide any document to prove the completion of 480 days of service, their services were regularized in regular vacancies by appointing them on daily wages and they were placed in the time scale of pay after completion of 240 days as per the Division Bench judgment dated 08.12.2005 passed in W.A.No.2985 of 2005, etc. batch of cases.

11. It is further stated in the counter that, on the Appeal filed by the State Transport Corporation, judgments of this Court were also partly set aside by the Apex Court vide order dated 13.08.2010 in S.L.P.No.3065/2006, batch, to the extent that, the person who performed 240 days of services in the previous one year from the date of termination alone shall be provided employment.

12. The 2nd Respondent has further stated that, based on the Settlement arrived at between the Management of the Respondent/Transport Corporation and the Trade Unions on 31.08.2005 under Section 12(3) of the Industrial Disputes Act, 1947, the Government issued G.O.(Ms) No.41, Transport (C1)

Department, dated 21.07.2005, based on which, the Respondent/Transport Corporation appointed the Petitioner as 'Driver' with effect from 18.08.2006 and his services were regularized with effect from 01.07.2007. Thereafter, the Petitioner was dismissed from service vide order dated 01.06.2015 for the misconduct of unauthorized absence in duty. According to the 2nd Respondent, when the Petitioner has not proved his services as per Law and having joined duty accepting the order of the Respondent/Transport Corporation, he cannot claim continuity of service, etc.

13. Heard the learned counsel on either side and perused the material documents available on record.

14. Facts narrated supra are not in dispute. The Petitioner was granted permanent status by the 3rd Respondent herein vide order dated 31.03.2005 and seeking to implement the same, the Petitioner is before this Court.

15. It is no doubt true that, Two Judges of the Apex Court in Forest Range Officer's case (cited supra) has held that, the burden lies on the employee to prove his case. In the said judgment, the Apex Court has nowhere held that, in case, where all circumstances indicate that the employee had worked and records are with the Management, the Court will not accept the version of the employer and no adverse inference should be drawn against the employee. Relevant portion of the said judgment reads thus:

"In the instant case, dispute was referred to the Labour Court that the respondent and worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10th August, 1998, came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the Management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not,

though reliance is placed on the decision of this Court in *State of Gujarat v. Pratam Singh Narsinh Parmar*, JT (2001) 3 SC 326. In our opinion the Tribunal was not right in placing the onus on the Management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

16. In the case of *Manager, Reserve Bank of India vs. S.Mani* reported in 2005 (5) SCC 100, Three Judges of the Apex Court has held that, the initial burden is on the workmen to show that, they had completed 240 days of service and once, they have discharged the initial burden, it is for the employer to establish that, the case of the workmen is incorrect. For better appreciation, relevant portion of the said judgment is extracted hereunder:

"28. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service stating:

"It is admitted case of the parties that all the first parties under the references CRs Nos. 1 to 11 of 1992 have

been appointed by the second party as ticca mazdoors. As per the first parties, they had worked continuously from April 1980 to December 1982. But the second party had denied the abovesaid claim of continuous service of the first parties on the ground that the first parties has not been appointed as regular workmen but they were working only as temporary part-time workers as ticca mazdoor and their services were required whenever necessity arose that too on the leave vacancies of regular employees. But as strongly contended by the counsel for the first party, since the second party had denied the abovesaid claim of continuous period of service, it is for the second party to prove through the records available with them as the relevant records could be available only with the second party." "

17. In yet another decision in the case of Ranjit Sagar Dam v. Sham Lal reported in (2006) 9 SCC 124, the Apex Court has held that, initial burden of proof that, the workman has rendered 240 days of service in a year, is on him. Once evidence is produced, the burden shifts on the Management. Relevant portion of the said judgment reads thus:

"2. In support of the appeal, the learned counsel for the appellants submitted that the High Court has clearly lost sight of the fact that the claim was highly belated. No finding was even recorded by the Labour Court on this plea which was specifically raised. Further, the Labour Court had wrongly held that it was for the employer to prove that the workman concerned had not worked for 240 days or more in the year immediately preceding the date of termination.

4. In a large number of cases the position of law relating to the onus to be discharged has been delineated. In Range Forest Officer v. S.T. Hadimani [(2002) 3 SCC 25 : 2002 SCC (L&S) 367] it was held as follows: (SCC p. 26, paras 2-3)

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation.

The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10-8-1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an 'industry' or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratamsingh Narsinh Parmar [(2001) 9 SCC 713 : 2002 SCC (L&S) 269] . In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on

the same terms as he was allegedly engaged prior to his termination, within two months from today."

18. In a similar circumstance, the Karnataka High Court in the case of Madura Sugars Staff Union vs. Madura Sugar Mills reported in 2002 (3) LLN 465, has held that, even though the burden is on the workman, it is the Management who has the muster-roll of the workman to produce the same.

19. It is also worth referring to the decision rendered by the Punjab and Haryana High Court in Madhusudan's case reported in 2003 (102) FJR 310, wherein, it was held that, the Bank is bound to produce the records failing which the reference should be answered in favour of the workman. Relevant portion of the said judgment is extracted hereunder:

"A party seeking equitable relief from the courts has a bounden duty to disclose all material facts and documents which may have a bearing on the decision of the case. The party, be it the petitioner or the respondent, is not allowed to omit certain documents, which if disclosed, would perhaps lead to an unfavourable order being passed against that party. If by not disclosing such a document any favourable order is taken from the court, the same is liable to be rescinded / vacated on the correct facts being brought to the notice of the court."

20. Rule 6(4) of the 1981 Act makes it clear that, the employer will have to maintain records and the same have to be produced before the Court. In the case on hand, the Management of the Respondent/Transport Corporation has not produced any document in support of their contention and the Authority was right in drawing adverse inference against the Management, by accepting the case of the Petitioner.

21. It is seen that, the 3rd Respondent, who is the Authority under the 1981 Act, has rendered a finding of fact that, the Petitioner and other employees have completed 480 days of continuous service in a period of 24 calendar months. That being the case, on and from the completion of two years of service, the Petitioner should have been regularized in service. Appointing the Petitioner as 'Driver' on daily wage basis with effect from 18.08.2006 based on G.O.(Ms) No.41, dated 21.07.2005, and regularizing his services from 01.07.2007, is inconsequential.

22. It is not in dispute that, the Apex Court has rendered a decision on 13.08.2010 in S.L.P.No.3065/2006, batch, to the extent that, the person who has rendered 240 days of services in the previous one year from the date of termination alone shall be provided employment. That has nothing to do with the order dated 31.03.2005 passed by the 3rd Respondent herein under the 1981 Act, as the Petitioner herein is seeking for implementation of the said order. When the Respondent/Transport Corporation was unsuccessful in challenging the said order in W.P.No.39322 of 2005, as it came to be dismissed on 28.04.2006, the Management cannot be put in a better pedestal and ask the employees to be always in the receiving end, when there is an order in favour of the employees.

23. If the Petitioner's services have been divested of earlier before approaching the Authority under the 1981 Act, this Court would have directed the Petitioner and other employees to approach the appropriate Labour forum. But, in the present case, during the pendency of the proceedings, he has been divested of the duties and thereafter, reinstated in service with effect from 18.08.2006. Subsequently, for the misconduct of unauthorized absence in duty, the Petitioner has been dismissed from service, which is not the subject matter of the present Writ Petition.

24. At this juncture, it is worth referring to a Division Bench decision of this Court in the case of N.Mamundiraj vs. Bharat Heavy Electrical Ltd., Trichy reported in 1999 (1) LLJ 622, wherein, it is held that, the question of unfair labour practice can be gone into by the Authorities concerned. Relevant portion of the said judgment, reads thus:

"25. As observed in the earlier part of our Judgment that breaks in service, if any, brought out in the chart of the days the appellants have worked, it can be reasonably inferred that the respondent has resorted to unfair labour practice and the discharge of the appellants for cease of relationship of master and servant even if assumed to be quint-essential suffers from the vires of malice apart from being in violation of the State's policy, if I may say so it would be void order. The workman would be deemed to be in service when the cessation of work has been brought about by the employer for extraneous consideration, as in the case in hand.

26. In view of the observations made above, what is required to be determined by

the authorities is not the question what Hon'ble single Judge, with respect, has posed, but the following questions:

(i) Whether the: appellants have worked for 480 days in preceding 24 calendar months:

(ii) Whether the interrupted period of service, if any, or cessation of work if any, brought about is an unfair labour practice. Keeping in view the observations made in the earlier part of the Judgement, if the answer is in affirmative, the worker would be entitled to the conferment of the status of permanent employee with effect from the date of termination of service with all other consequential reliefs following from such a declaration. The second respondent is directed to determine the above referred questions within three months, from the date of receipt of a copy of this Judgement, after affording an opportunity of being heard, to both the parties."

In the said decision, the Hon'ble Division Bench has also held that, the Authority is empowered to decide about the unfair labour practice, in order to ascertain the interrupted period of service or cessation of work.

25. Divesting of duty during the pendency of proceedings under the 1981 Act, or the subsequent proceedings if any, is illegal and it is the act of unfair labour practice and colourable exercise of power, which has got to be interfered with. This Court reiterates that, the subsequent dismissal/removal of the Petitioner from service on account of unauthorized absence is not gone into, in this order.

26. The Apex Court in the case of Managing Director, Tamil Nadu State Transport Corporation vs. Neethivilangan, Kumbakonam (Appeal (Civil) No.3593 of 2001, vide judgment dated 04.05.2001), has held that, the High Court can issue a mandamus for implementation of the order of the Authority.

27. In the case on hand, merely because, the Petitioner was appointed as 'Driver' with effect from 18.08.2006 and his services were regularized with effect from 01.07.2007, it does not mean that, he has given up his rights for the initial period of service. Naturally, he has to earn and survive. The Apex

Court in the case of Central Inland Water Transportation Ltd. vs. Brojo Nath Ganguly reported in (1986) 3 SCC 156, has held that, in the negotiation table, the relationship between the employer and the employee is like that of a lion and a lamb, and both the lion and the lamb will be free to roam about in the jungle and each will be at liberty to devour the other.

28. Already 15 years have gone by from the date of filing of the present Writ Petition, and that, no purpose will be served if the discretion is given to the Management of the Respondent/Transport Corporation to implement the order dated 31.03.2005 passed by the 3rd Respondent. If the contention of the Management is allowed, they will take a stand that, they are superior to the Authority under the 1981 Act. Ultimately, the order passed by the Authority will remain a paper order and it would not be implemented. Insofar as the Petitioner herein is concerned, the order dated 31.03.2005 has gone up to the Supreme Court and become final. Even going by the counter Affidavit of the Respondent/Transport Corporation, the employee would be entitled to wages on completion of 480 days of service in a period of two years and monetary benefits need to be extended to him till the date of dismissal from service.

29. The employer cannot relegate the employee to go before the Labour Court for computation of monetary benefits. If such an order is passed, three options are open to the employee viz. (i) he can approach the Labour Court for computation of monetary benefits or (ii) he can file a Contempt Petition against the Management for disobeying the orders of this Court or (iii) he can take steps to prosecute the Management under the 1981 Act against the present Officials, who are to implement the order of the Authority.

30. In view of the foregoing, when the Petitioner has an order in his favour, in order to avoid further round of litigations, this Court holds as under:

(i) the Management of the Respondent/Transport Corporation is directed to implement the order dated 31.03.2005 passed by the 3rd Respondent vide proceedings No.Aa/993/2001, forthwith, within a period of thirty (30) days from the date of receipt of a copy of this order.

(ii) All monetary benefits due to the Petitioner from the date of his completion of 480 days in a period of 24 calendar months, and other consequential benefits, after adjusting the amount already paid to him till he faced the order of dismissal from service, shall be paid to

him within a period of thirty (30) days from the date of receipt of a copy of this order, together with interest at 12% per annum.

(iii) Calculation of monetary benefits to the Petitioner shall be made as it was done in the case of similarly placed employees.

(iv) The Management of the Respondent/Transport Corporation shall furnish names of the Officials concerned, who are responsible for implementing the order of the Authority, and for calculation of monetary benefits.

(v) If the order dated 31.03.2005 passed by the 3rd Respondent is not implemented within the time stipulated supra, interest payable to the Petitioner for the delay in implementing the said order, shall be recovered from the salary of the Officials, who are responsible to implement the same, as was held by the Apex Court in the case of Central Co-operative Consumers vs. Labour Court (AIR 1994 SC 23). Such accrued interest shall be paid by the Respondent/Transport Corporation to the Petitioner and recovered from the Officials concerned.

(vi) Names of the Officials, who are to implement the order dated 31.03.2005 passed by the 3rd Respondent herein, have to be furnished to the Petitioner and also to the Registry of this Court.

The Writ Petition stands disposed of with the above directions and observations. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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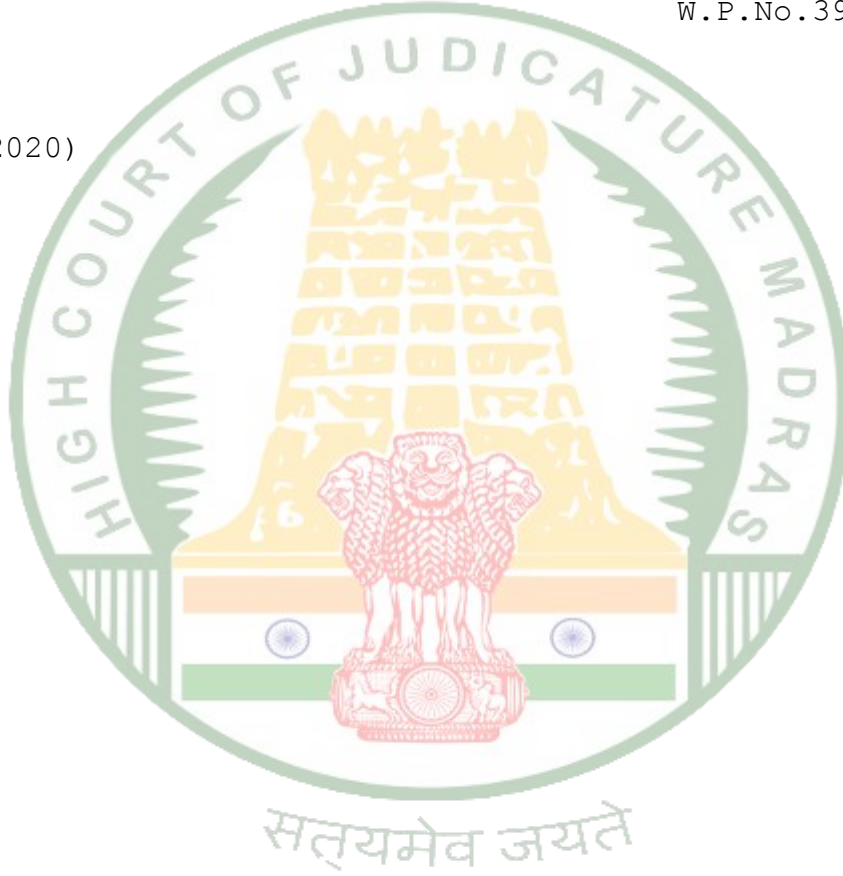
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Salem.

+1cc to Mr.D.Raghu,TNSTC(SALEM), Advocate, S.R.No.28599
+1cc to the Government Pleader, S.R.No.24913

Pre-delivery order
in
W.P.No.39992 of 2005

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