

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON 24.01.2020
ORDER DELIVERED ON 05.02.2020

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.31451 of 2018

and

W.M.P.No.36647 of 2018

The Management of

M/s. Bhakthavatsalam Vidhyashram,
No.596, A1 & A2, TNHB Colony,
Periyar Nagar, Korattur,
Chennai - 600 080

... Petitioner

vs

M.Rajeswari
W/o Munuswami

... Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for the records relating to the order of the III Additional Labour Court in I.D.No.234 of 2016 dated 25.01.2018 and quash the same.

For Petitioner : Mr.R.Parthiban

For Respondent : Mr.S.Ravi

O R D E R

The present writ petition is filed challenging the award of the Labour Court made in I.D.No.234/2016 dated 25.01.2018.

2. The petitioner is the Management. The case of the writ petitioner is as follows:

(a) The petitioner is an Educational Institution. The duty of the respondent is to clean the class rooms and verandahs and also to take care of small children. Thus, the respondent was working as a daily wage employee in the petitioner Institution as Ayah from 07.06.2010. From 02.04.2016, the respondent was continuously absent. She neither submitted any leave application nor obtained permission from the petitioner Management for her absence. In order to maintain cleanliness of the class rooms and verandahs, the petitioner engaged other contract workman to do

the job, which was done by the respondent. It was a regular practice of the respondent to absent from duty without obtaining permission from the Management nor submitting any leave application. The list of number of days where the respondent was absent without obtaining permission from the Management is detailed below:

Period(year)	No. of days absent without permission
June 2010-April 2011	13 ½ days
June 2011-April 2012	7 ½ days
June 2012-April 2013	17 ½ days
June 2013-April 2014	6 days
June 2014-April 2015	4 ½ days
June 2015-April 2016	7 ½ days

(b) Since the respondent has taken a long leave, the Management was under the impression that she has abandoned her service. If a person is absent for a long period, for which, leave of any kind was not granted, he should have been treated to have resigned and ceased to be in service. In such a case, there is no need to hold an enquiry or to give any notice, since the respondent admitted that she was working only as a daily wager. The petitioner never treated the respondent as permanent employee. Hence, no domestic enquiry was conducted. The respondent raised an Industrial Dispute in I.D.No.234/2016. The Labour Court passed an award directing the petitioner Management to reinstate the respondent with continuity of service and 50% backwages. After the award, since there was no vacancy in the High School, the petitioner Management spoke to the Bakthavatachalam Memorial Trust, which is running the High School and a College for Women, both Institutions located in the same Campus. The Trust agreed to reinstate the respondent in Bakthavatchalam Memorial College. Accordingly, the said Trust sent a letter to the respondent on 07.11.2018 calling upon the respondent to report duty immediately to reinstate her in the College. However, the respondent, on receipt of the said letter did not join duty. Therefore, the Management is left with no other option except to challenge the order of the Labour Court. Hence, the present writ petition.

3. The respondent filed a counter affidavit, wherein it is stated as follows:

She was working under the writ petitioner as Ayah from 07.06.2010 continuously till 02.04.2016 without any break. She was under medical treatment for severe fever from 02.04.2016 to

27.04.2016 and the same has been duly informed to the Management. After recovery, she reported for duty on 28.04.2016 and produced necessary medical certificate. However, she was informed that there was no work for her and asked her to submit resignation letter. Though she reported for duty on several times after 28.04.2016, the same was not considered. Hence, after issuing notice to the Management, she filed a petition under section 2A of the I.D. Act before the Labour Officer. In the conciliation proceedings, the Management failed to file any reply. Hence, the conciliation ended in failure. Consequently, I.D.No.234/2016 was filed, where the Labour Court has passed the impugned award. It is wrong to state that the respondent was working on daily wages. She was paid monthly salary of Rs.5,500/- . In view of her sickness, she had to undergo treatment for 25 days and the doctor also certified that she is fit to join duty from 28.04.2016. The writ petitioner having permitted this respondent to avail leave, it is meaningless to accuse this respondent that she had never informed about her leave. She had availed only 25 days medical leave which cannot be construed to be a long one. Apart from the post in which this respondent was working, two more vacancies arose after the impugned award was passed, when an Ayah by name, Kanniga retired on 30.06.2018 and another Ayah by name, Jayarani expired on 14.04.2019. In view of the award passed by the Labour Court, the petitioner Management has to reinstate this respondent in the same position as she held before her termination. She sent a letter dated 12.02.2018 and another letter through Union dated 03.07.2018 expressing her willingness to join duty. Even after receipt of those letters, the Management did not come forward to reinstate her. Hence, she filed a Claim Petition in C.P.No.181/2018 before the Labour Court claiming backwages. The service conditions for workers are entirely different in Baktahvatchalam Vidhyasham School, where she was employed, while the Bakthavatchalam Memorial College, which is affiliated to the Madras University is having a different service condition. Therefore, this respondent rejected the offer of alternate employment in another concern.

4. Mr.R.Parthiban, learned counsel for the petitioner submitted as follows:

(a) The respondent was a temporary employee. She did not work for 240 days in a calendar year. The burden is on the respondent to prove that she worked for 240 days in 12 months and such onus is not discharged by the respondent. The respondent has also admitted in her cross examination that she worked as temporary employee. 1981(3) SCC 225 (Mohan Lal vs. Bharat Electronics Ltd.) and 2018(15) SCC 641 (Mohd.Ali vs. State of Himachal Pradesh & Ors) are relied on in support of the

contention that burden is on the workman to prove that he worked for 240 days. The Labour Court has not rendered any finding regarding the issue of 240 days working.

(b) If Section 25(f) is violated, only compensation can be awarded. In support of such contention, the following decisions are relied on:

- i) 2009(15) SCC 327 (Jagbir Singh vs. Haryana State Agriculture Marketing Board and another),
- ii) 2010(9) SCC 126 (Incharge Officer and another vs. Shankar Shetty),
- iii) 2012(1) SCC 558 (BSNL vs. Man Singh),
- iv) 2013(5) SCC 136 (Rajasthan Development Corporation vs. Gitam Singh),
- v) 2013(10) SCC 253 (Vijay S.Sathaye vs. Indian Airlines Limited & Ors),
- vi) 2016(16) SCC 610 (State of Madhya Pradesh and another vs. Vinod Kumar Tiwari),
- vii) 2018 (12) SCC 298 (District Development Officer & another vs. Satish Kantilal Amrelia).

(c) If absence is for a long period, it is to be construed as abandonment. In support of the above contention 2013(10) SCC 253 (Vijay S.Sathaye vs. Indian Airlines Limited & Ors) is relied on.

(d) Reinstatement is only an exception and not a rule. In this connection 2018(12) SCC 294 (Rashtrasant Tukdoji Aharaj Technical Education Sanstha v. Prashant Manikrao Kubitkar) is relied on. In spite of all these factors, though the petitioner Management was willing to take the respondent into the College, she refused to accept such offer/reinstatement and therefore, she is not entitled for any indulgence from this Court.

5. Learned counsel for the respondent Mr.S.Ravi, submitted as follows:

(a) The Labour Court passed the award of reinstatement with 50% of backwages only. The claim of the respondent that she worked as Ayah from 17.05.2010 to 02.04.2016 is not specifically denied by the respondent Management in their counter filed before the Labour Court. They only disputed the initial date of joining and contended that it was 07.06.2010 and not 17.05.2010. No notice was issued and no enquiry was conducted before terminating the petitioner. The Management did not file any document before the Labour Court. On the other hand, this respondent marked three documents. When the award was not implemented, the respondent filed Claim Petition. In letter dated 07.11.2018, the Management expressed their inability to comply with the award only by stating that there was no vacancy.

There were two vacancies caused due to the retirement of one Kanniga and the death of one Jayarani on 30.06.2018 and 14.04.2019 respectively. Therefore, the Management was not justified in saying that there was no vacancy. This respondent did not abandon the service. Since the petitioner Management did not say in their counter before the Labour Court that this respondent did not work for 240 days, the said issue cannot be raised as the first time before this Court. This respondent received monthly wages. Even otherwise, the workman is not required to prove 240 days working if there is a clear cut admission or no specific denial about the said position. In this connection, the judgment reported in 2010(3) SCC 192 (Harjinder Singh vs. Punjab State Warehousing Corporation) is relied on.

(b) Only under four circumstances alone compensation in lieu of reinstatement can be given for violation of Section 25(f). The Hon'ble Apex Court in AIR 2015 SC 357 (Tapash Kumar Paul vs. BSNL) has spelt out those four circumstances. None of those circumstances was existing in this case. Therefore, the petitioner Management is not justified in stating that compensation alone can be awarded and not reinstatement. In this connection, the judgments reported in 1980(4) SCC 443 (Surendra Kumar Vs. Industrial Tribunal) and 1988(1) LLN 259 (Bombay) (Gaurishankar Vishwakarma vs. Eagle Spring Industries Pvt.Ltd. and Ors.) are also relied on in favour of the respondent.

6. Heard both sides and perused the materials placed before this Court.

7. The respondent was working as Ayah under the petitioner Management. This position was not denied by the Management. While the respondent claimed that she was working in such capacity from 17.05.2010 to 02.04.2016 continuously, the petitioner Management contended that she was a temporary employee and not worked for 240 days in 12 calendar months. The above objection of the Management that the respondent was only a temporary employee and not worked for 240 days in 12 calendar months, has not at all been taken as an objection in their counter statement filed before the Labour Court. On the other hand, it is stated in the counter therein that the respondent herein was working in the petitioner Management as Ayah from 07.06.2010 and not from 17.05.2010 and the last drawn salary per month was Rs.5,500/-. Therefore, it is evident that the above objection is made by the Management as the first time before this Court without making any such objection before the Labour Court. Consequently, such objection now made by the learned counsel for the petitioner, cannot be entertained by this Court as it is purely a question of fact. Even in the affidavit filed

in support of the writ petition, it is only stated that the respondent's duty was to clean the class rooms and verandah and also to take care of small children and that the respondent was working on daily wage in the petitioner Institution as Ayah from 07.06.2010 and that from 02.04.2016, the respondent was continuously absent. Therefore, from the very pleadings of the petitioner Management, both before the Labour Court and this Court, it is evident that the respondent was working in the petitioner Management, if not from 17.05.2010, as claimed by the respondent, at least from 07.06.2010, as admitted by the petitioner Management. Under such circumstances, the learned counsel for the petitioner is not supported by any pleadings for his contention that the respondent did not work for 240 days in 12 calendar months. Even according to the petitioner Management, the respondent was continuously absent from 02.04.2016. Therefore, it is evident that from 07.06.2010 till 02.04.2016 nearly for a period of six years, the respondent was continuously working in the petitioner Management. Even going by the contention of the Management regarding number of days, the respondent was absent without permission from June 2010 to April 2016 for each year, as given in the tabular column, would only indicate that it ranges from 4 ½ days to the maximum of 17 ½ days. Therefore, the contention of the petitioner Management that the respondent did not work for 240 days is liable to be rejected.

8. It is submitted by the learned counsel for the petitioner that burden of proof that the respondent worked for 240 days in 12 calendar months is on her. In support of such contention, the learned counsel relied on 1981(3) SCC 225 (Mohan Lal vs. Bharat Electronics Ltd.). At this juncture, it is to be noted as to when such burden arises on the workman to discharge. Needless to state that only when the Management has specifically denied the claim of an employee about the working of more than 240 days, it can be stated that the burden is on the workman to prove the same. In this case, the facts and circumstances are otherwise. As already discussed supra, the respondent has specifically claimed in her claim statement that she was working as Ayah under the respondent Management from 17.05.2010 to 02.04.2016 without any break and her last drawn salary is Rs.5,500/-. To the above claim, when a counter is filed by the Management before the Labour Court, no denial was made except in respect of the date of appointment. In the absence of specific denial of the claim of the workman about his /her continuous employment, there is no requirement or necessity for the workman to prove the same. A claim made, not disputed by the other side, has to be construed as an accepted one. Pleadings of the respective parties on a particular claim is to be clear and specific.

General denial of the pleadings of the other party cannot be taken as shelter in the absence of specific denial or contra pleading. In other words, what is denied by the other side alone need to be proved by the claimant by adducing evidence. Therefore, I am of the view that the contention of the Management that the petitioner has not proved before the Labour Court about her continuous employment is liable to be rejected. A feeble attempt was made by the Management to rely upon the statement made by the respondent during cross examination as if she was a temporary employee. Assuming that she has admitted that she was a temporary employee, the fact remains, based on the admitted pleadings of the respective parties that she was continuously engaged in such capacity from 2010 to 2016 onwards. Therefore, the Management is not justified in taking shelter under the statement made by the respondent during her cross examination totally ignoring their stand taken in the counter affidavit.

9. It is also contended by the learned counsel for the petitioner that the Labour Court has not rendered any finding regarding 240 days issue. When such claim was disputed in the pleadings and when no issue was raised by the Management to that effect, there is no necessity or occasion for the Labour Court to go into such issue and give findings. In other words, the Labour Court need not give any finding on the undisputed or admitted position.

10. The next contention raised by the learned counsel for the petitioner is that if there is no violation of Section 25 (f), only compensation alone has to be awarded in lieu of reinstatement. He further contended that reinstatement is only an exception and not a rule. In support of his contention, he relied on (i) 2009(15) SCC 327, (ii) 2010 (9) SCC 126, (iii) 2012(1) SCC 558, (iv) 2013(5) SCC 136, (v) 2013(10) SCC 253, (vi) 2016(16) SCC 610 and (vii) 2018(12) SCC 294.

11. On the other hand, the learned counsel for the respondent relied on the decision of the Hon'ble Apex Court reported in AIR 2015 SC 357 (Tapash Kumar Paul vs. BSNL) and contended that substitute of order of reinstatement by awarding compensation can be justified only when four grounds exist in a given facts and circumstances viz., (i) the Industry is closed; (ii) the employee has superannuated or going to retire shortly; (iii) the workman has been rendered incapacitated to discharge the duties; and (iv) he has lost confidence on the Management to discharge duties. After saying so, the learned counsel submitted that none of those four grounds exist in the present case. The Apex Court in the above decision at paragraph Nos.3 and 4 has

observed as follows:

3. It is no doubt true that a Court may pass an order substituting an order of reinstatement by awarding compensation but the same has to be based on justifiable grounds viz. (i) where the industry is closed; (ii) where the employee has superannuated or going to retire shortly and no period of service is left to his credit; (iii) where the workman has been rendered incapacitated to discharge the duties and cannot be reinstated and / or (iv) when he has lost confidence of the Management to discharge duties. What is sought to be emphasised is that there may be appropriate case on facts which may justify substituting the order of reinstatement by award of compensation, but that has to be supported by some legal and justifiable reasons indicating why the order of reinstatement should be allowed to be substituted by award of compensation.

4. In the instant matter, we are not satisfied that the appellant's case falls in to any of the categories referred to herein before which would justify compensation in lieu of reinstatement. We thus find no justification for the High Court so as to interfere with the Award passed by the Tribunal which was affirmed even by the Single Judge, but the Division Bench thought it appropriate to set aside the order of reinstatement without specifying any reasons whatsoever, as to why it substituted with compensation of a meagre amount of Rs.20,000/- to the appellant.

12. In the very same decision, the concurring view expressed at paragraph No.3 in the later part of the said decision, it has been observed as follows:

3. However, it is pertinent to mention that the recent decision of this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Ors.[3] took a contrary view. The Court in this case, opined as under:

22. 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 employee concerned, 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. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

13. As rightly contended by the learned counsel for the respondent, none of the four grounds as stipulated in Tapash Kumar Paul's case exist in the present case for the Management to say that reinstatement cannot be ordered and in lieu thereon, compensation should have been awarded.

14. Learned counsel for the petitioner relied on 2018(12) SCC 294 (Rashtrasant Tukdoji Aharaj Technical Education Sanstha v. Prashant Manikrao Kubitkar) to contend that reinstatement in service is not the rule but an exception and ordinarily grant

of compensation would meet the ends of justice. Perusal of the facts and circumstances of the above case would show that the workman therein had worked only for a period of 2 years and 3 months and approached the Labour Court, after a period of 13 years. Therefore, compensation in lieu of reinstatement without backwages was justified in that case by making observation that reinstatement in service is not the rule but an exception. First of all, it is to be noted that the said decision is not to be construed as if there can be no reinstatement in all cases of violation of Section 25(f). On the other hand, it is stated that under exceptional circumstances, the reinstatement can be ordered. In this case, it is to be noted that the respondent had worked for 6 years continuously and she was denied employment without issuing any notice and conducting an enquiry. Denial of employment was on the reason that the respondent continuously absent from 02.04.2016. On the other hand, it is the claim of the respondent that she was suffering from severe fever from 02.04.2016 to 20.04.2016 and by duly informing the Management about the same, she reported duty on 28.04.2016 and produce necessary medical certificate along with her leave application. However, the Management did not permit her to join duty. When such being the case of the respondent, the Management is not justified in contending that she is not entitled to any notice followed by enquiry. Since the retrenchment is passed on the allegation of unauthorised absent, the Management ought to have followed due process of law by issuing notice and conducting enquiry. In this case, it has not been done so. Therefore, such violation of principles of natural justice would come under the purview of exceptional circumstances as contemplated in the decision of the Apex Court warranting reinstatement in service, instead of awarding compensation as claimed by the petitioner Management.

15. In view of the above stated facts and circumstances, the decisions relied on by the learned counsel for the petitioner in respect of his contention of Section 25(f) are not applicable to the present facts and circumstances.

16. Learned counsel for the petitioner further relied on the decision of the Hon'ble Supreme Court reported in 2013(10) SCC 253 (Vijay S.Sathaye vs. Indian Airlines Limited & Ors) to contend that if the absence is for long period, it is to be construed that the workman has abandoned the job. First of all, in this case, it is to be noted that the period of absent is not at all proved by the Management except to state that she was absent from duty from 02.04.2016. No notice was issued. No enquiry was conducted and no evidence was let in before the Labour Court as to how long the respondent was absent. On the

other hand, the respondent specifically claimed that she reported duty on 28.04.2016 along with medical certificate and that she was denied employment. In support of such pleadings, she also filed Ex.W1 medical certificate before the Labour Court. To disprove the same, the Management has not adduced any documentary evidence. Therefore, the reliance placed by the learned counsel for the petitioner in the above decision of the Apex Court is also of no avail.

17. Above all, it is to be noted that it is not the case of the Management that it is not at all interested in taking the respondent back. On the other hand, it is their specific case that they are willing to take the respondent, provided she is willing to join the College run by the very same Trust.

18. At this juncture, it is to be noted that admittedly, the respondent was employed as Ayah to look after the small children at the elementary level. It is also to be noted that service conditions of the employee in the School vary with the service conditions of an employee in the College. The reasons stated by the Management for not reinstating the respondent after the award was passed is that there was no vacancy in the School. On the other hand, the petitioner has specifically pleaded that there were two vacancies in the School after retirement and death of one Kanniga and Jayarani, respectively. In fact, in the Claim Petition in C.P.No.181/2018 filed by the respondent, pursuant to the award, it is admitted by the Management witness that one Kanniga who worked as Ayah retired on 30.06.2018 and that one Jayarani who worked as Ayah died on 14.04.2019 and that they did not fill both vacancies. At this juncture, it is to be noted that the award of the Labour Court was passed on 25.01.2018 whereas those vacancies had arisen subsequently on 30.06.2018 and 14.04.2019. Therefore, it is very clear that the petitioner Management deliberately with an intention to deny the employment to the respondent in the very same School has not chosen to implement the award by falsely claiming that there was no vacancy in the School at the relevant point of time. Let the mighty Management not fight with the poor workman like this, which appears nothing but a pure egoistic fight.

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19. Considering the above stated facts and circumstances, I

find that the award of the Labour Court in ordering reinstatement is just and proper and does not require any interference. Accordingly, the Writ Petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VI)

/true copy/
Sub Asst. Registrar

vsi

To

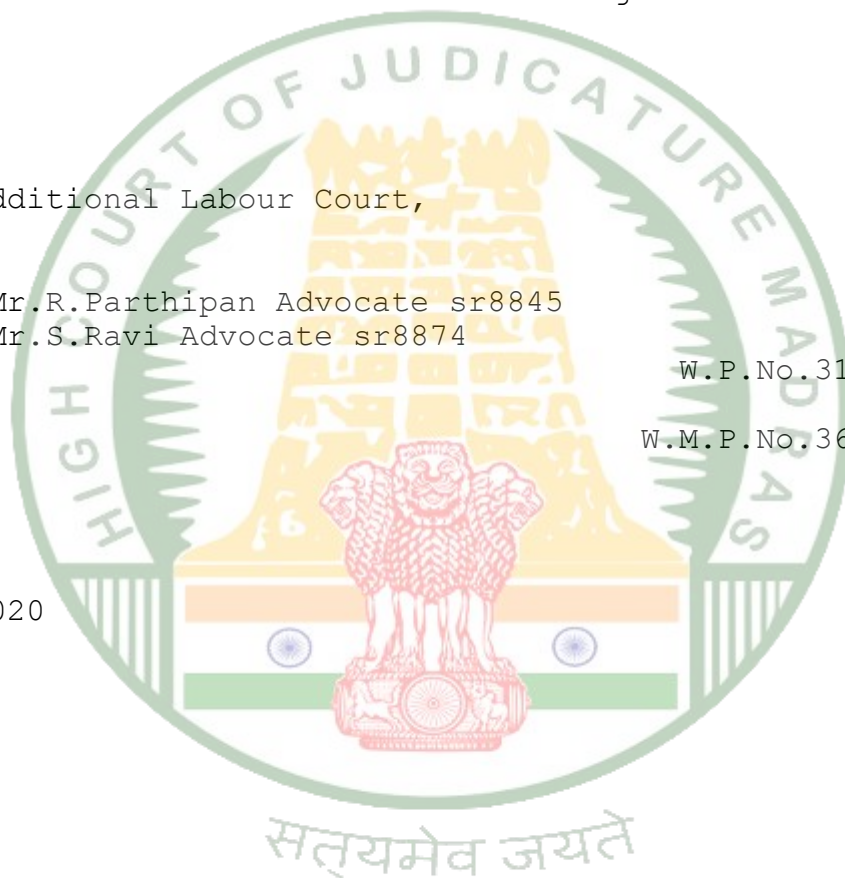
The III Additional Labour Court,
Chennai.

+1 cc to Mr.R.Parthipan Advocate sr8845

+1 cc to Mr.S.Ravi Advocate sr8874

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