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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

W.A.No.903 of 2016 and
CMP.No.11588 of 2016

The Deputy General Manager (H.R.D.),
Air India, Unity Complex,
Anna International Airport,
Chennai-600 043.

... Appellant/Petitioner

-vs-

1. The Presiding Officer,
Central Government Industrial Tribunal-
Cum-Labour Court,
I Floor, 'B' Wing, Shastri Bhavan,
26, Haddows Road,
Chennai-600 006.

2. The Regional Secretary-Kerala,
Air India Employees' Guild,
Museum Road, Vellayambalam,
Trivandrum-695 003.

... Respondents/Respondents

Writ Appeal filed under Clause 15 of the Letters Patent
against the order dated 05.06.2012 passed in W.P.No.22966/2007
by a learned Single Judge of this Court.

Prayer in W.P.No.22966/2007:

This Writ petition is preferred under Article 226 of the
constitution of India praying for the issue of a Writ of
certiorari to call for the records pertaining to
I.D.No.46 of 2005 on the file of the first respondent including
the Award passed therein, dated 04.12.2006 (the copy of which
was received by the petitioner on 23.02.2007) and quash the same.

For Appellant : Mr.K.Srinivasamoorthy

For 2nd Respondent : Mr.K.M.Ramesh

R1 : Court



JUDGMENT

(Judgment of the Court was pronounced by T.RAJA, J.)

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This Writ Appeal has been preferred against the order dated 05.06.2012 passed in W.P.No.22966/2007 by a learned Single Judge of this Court, thereby declining to interfere with the award dated 04.12.2006 passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai in I.D.No.46/2005.

2. The case of the appellant in brief is as follows:

(a) One Mr.J.N.Gopakumar was employed as a Welder in the ground service of the Air India at Tiruvanandapuram. The trade union, i.e., the second respondent had raised an industrial dispute regarding his absorption. The dispute was conciliated by the Assistant Labour Commissioner (Central), Tiruvanandapuram on 11.9.2000. A settlement under Section 12(3) was reached between the union and the management. The concerned workman Gopakumar was also a signatory to the said settlement. In the settlement, the following terms were agreed between the parties :

"1.It is agreed by the management of Air India that Shri Gopakumar, Contract Labour, will be employed on casual basis in the Ground Services Department of Air India, Trivandrum, without any artificial break in service, with immediate effect.

2.Shri Gopakumar will undergo medical examination and will be subjected to character antecedent verification from the duly constituted authority.

3.It is further agreed that the employment of Shri Gopakumar as a casual worker in Air India will continue subject to the result of medical examination and character antecedent verification.

4.It is also agreed that if and when Air India resorts to recruit people on permanent basis, Shri Gopakumar will be given preference.

5.The Guild agrees that the demands in respect of the workman Shri Gopakumar is settled fully and completely and will not have any claim against Air India either by way of monetary or otherwise.

6.Parties will submit the report on implementation of this settlement to the ALC(C),



Trivandrum by 20.9.2000."

WEB COPY (b) In the meanwhile, Hon'ble Apex Court vide its judgment in Air India Statutory Corporation Vs. United Labour Union and others reported in (1997) 9 SCC 377 directed regularization of all contract labours in processes where the engagement of contract labour were abolished. The Air India had implemented the said judgment only in respect of Mumbai and Delhi. But they ignored the employees in South India who were on rolls on 6.12.1996 and that J.N.Gopakumar is one such employee who denied permanency. Subsequently, the Air India had agreed to conduct verification of antecedents and also medical examination. Subsequent to the said exercise, the workman J.N.Gopakumar was continued as a permanent casual labour without granting any artificial break in his service. Even the Regional Manager at Tiruvanandapuram by his letter dated 16.2.2000 had commented the sincerity and quality of work of J.N.Gopakumar and had recommended to the competent authority for his absorption in the services of the Air India. It was also mentioned in that letter that the said Gopakumar was rendering services since the Air India started self handling services from the year 1991. The payment of the said Gopakumar was settled through cash vouchers.

(c) On 4.7.2001, the General Manager, Mumbai had also recommended to the Director, HRD for approval to fill up the standard force vacancy at Tiruvanandapuram, so as to regularize the services of Gopakumar in order to comply with the memorandum of settlement arrived at before the Assistant Labour Commissioner (Central), Tiruvanandapuram. It was also stated that the said workman was engaged sufficiently for a long period for carrying out repair works of Container dollies, pallet dollies and baggage trolleys. These works are of permanent in nature. When a recruitment drive was made for the Engineering department during May, 2002, the workman also applied for the same as he possessed with required qualifications. He was called for a written examination. Even though he had passed the written examination, he was not given any preference for absorption as agreed in the settlement dated 11.9.2000. Therefore, once again a dispute was raised before the conciliation officer at Tiruvanandapuram demanding regularization of J.N.Gopakumar in the services of the management. The conciliation proceedings ended in failure and a report was sent to the Central Government. The Central Government through Ministry of Labour by its order dated 2.6.2005 had referred the dispute for adjudication by the CGIT.



(d) The CGIT had registered the dispute as I.D.No.46 of 2005 and issued notice to the management of Air India. The Air India had filed a counter statement dated Nil (October, 2005). In the counter statement, it was stated that the workman cannot demand regularization as a matter of right. While the Air India case (cited supra) covered only the processes covered by the notification dated 09.12.1976, the work done by the workman was not covered by the notification. He was called for the written test, but he did not qualify in the said test. Therefore, no preference can be given. It was further stated that there was no fresh recruitment carried out for the post in which he is presently engaged. Due to ban on recruitment for permanent post, the Air India was not in a position to regularize his services. However, as per the terms of understanding, the workman was continued in the work without any artificial break, but there was no possibility of regularization of his services.

(e) The second respondent union filed a rejoinder statement dated 14.10.2005, for which the management filed an additional counter statement dated Nil (December, 2005). The second respondent union had filed an additional rejoinder dated 23.1.2006.

(f) In the additional counter filed by the Air India, they sought for transfer of the case to the Tribunal at Tiruvananthapuram. The Union in its additional rejoinder contended that it is not a case of the contract labour that there is no contract agreement between the Air India and M/s.J.N.Engineering Works and Priya Engineering. The Air India was directed to produce contractual agreement between the parties. Since the workman was working in the operational area, there was no ban on recruitment in that area.

(g) Before the Tribunal, on behalf of the workman, the Regional Secretary of the Air India Employees Guild, Kerala State was examined as W.W.1. On the side of the management, one C.Mohandass was examined as M.W.1. While on the workman side, 19 documents were filed and marked as Exs.W.1 to W.19, on the side of the Air India, 7 documents were filed and marked as Exs.M.1 to M.7. The Tribunal on the basis of the materials placed before it came to the conclusion that the workman cannot get any regularization on the ground that the management had agreed to give preference in his appointment. But at the same time, it was not established before the Tribunal that the workman had failed to qualify himself in the written examination. The management did not act as per the terms of the settlement signed under



Section 12(3) of the I.D. Act. The management is bound to utilize the services of the workmen for the post. Therefore, by the impugned Award dated 04.12.2006, the CGIT directed the Air India to absorb the concerned employee into the services of the Air India from the date of the demand, i.e., from the date of his application made before the Assistant Labour Commissioner (Central), Tiruvanandapuram. When that award was challenged by the Deputy General Manager, Air India, Unity Complex, Anna International Airport, Chennai-43 before a learned Single Judge of this Court in W.P.No.22966/2007 dated 05.06.2012, the same was dismissed. Aggrieved over the same, the present Writ Appeal has been filed.

3. Learned Counsel appearing for the appellant assailing the impugned order argued that one of the members of the 2nd respondent Air India Employees' Guild, Trivandrum, Kerala, namely, J.N.Gopakumar has made a claim for regularisation with consequential monetary benefits from the date of his absorption as casual worker at the Trivandrum Airport and the same was allowed, without considering the legality of the claim made by the said J.N.Gopakumar. Explaining further, the learned Counsel for the appellant argued that J.N.Gopakumar was serving as a welder in Air India, Ground Services Department, Trivandrum since 1993. As his request for regularization was ignored, the 2nd respondent herein, vide its letter dated 9.12.1999 raised an industrial dispute before the Assistant Labour Commissioner (C), Trivandrum on various dates. While so, on 11.09.2000, it was agreed by the Management of Air India that when Air India resort to recruitment on permanent basis, the name of Mr.J.N.Gopakumar would be given preference. In spite of the promise given for regularization of the service of Gopakumar, again, it was ignored. Therefore, finally, an Industrial Dispute in I.D.No.46/2005 was raised before the 1st respondent, namely, Central Government Industrial Tribunal-cum-Labour Court, Chennai, demanding regularization of J.N.Gopakumar in the service of the appellant with a consequential direction to absorb him in its services w.e.f. the date of demand with consequential monetary benefits from such date of absorption i.e. from 09.06.2004.

4. Learned Counsel for the appellant further argued that it is true that 12(3) agreement was reached between the appellant and the 2nd respondent to give preference to Mr.J.N.Gopakumar as and when a new recruitment is resorted. But in the present case, when there was a notification issued inviting applications from the qualified persons to participate in the written examination to be held on 25.08.2002 and the said Gopakumar also took part in the examination, but he scored only 39 out of 150 marks and although he belongs to OBC category for whom the minimum cut off mark has been fixed at 53 constituting



35% of mark, he failed to reach the zone of consideration. Since he has secured only 39 marks out of 150 as it is far below the 53 marks, namely, 35% and in view of the fact that he has not come within the zone of consideration, as promised by the appellant, the rule did not permit the appellant to give such preference. The cut off per centage determined by the competent authority, namely, the Director of Engineering was 40% for General Candidates and 35% for SC/ST/OBC that means that out of 150 marks General Candidates scoring 60 marks and SC/ST/OBC candidates scoring 53 marks became eligible for personal interview. Therefore, when J.N.Gopakumar, has not even qualified to enter into the personal interview, the question of giving preference to him will not arise. But this factual aspect has not been placed by the appellant herein and also by the 2nd respondent before the 1st respondent. Hence, without going into the said aspect the learned Central Government Industrial Tribunal-cum-Labour Court, merely on the basis of the claim made by the 2nd respondent that the appellant has given promise that preference should be given to J.N.Gopakumar considering the fact that he has been working from 1993, directed the appellant to give the benefit of regularization. The question of granting the benefit of regularization would not arise since he has failed to qualify himself for coming within the zone of consideration by securing minimum marks, namely, 53 out of 150 marks, the award passed by the 1st respondent herein is liable to be set aside.

5. Adding further, the learned Counsel for the appellant argued that even if this Court come forward to accept the case of the 2nd respondent that Mr.J.N.Gopakumar is entitled to get regularization, he cannot get the benefit of the said order. The reason being that he already left India and joined Qatar Airways and drawing a salary of Rs.80,000/- p.m. Therefore, the question of granting the benefit of regularization to the said Gopakumar is also legally unsustainable.

6. On the other hand, learned Counsel for the 2nd respondent argued that although the said J.N.Gopakumar left the appellant Airways and joined Qatar Aviation Authority, his prayer is only limited and justified because he has been making his claim for regularization only from 09.06.2004. But the said J.N.Gopakumar had left India on 23.11.2006 and taken up employment in Qatar Aviation Authority and was employing as an Aircraft Equipment Operator in Doha Airport. Therefore, the issue decided by the learned Central Government Industrial Tribunal-cum-Labour Court, Chennai, which has been confirmed by the learned Single Judge of this Court cannot be declined. The reason being that it is only the Air India which is procrastinating the issue relating to regularization of workman by raising all different pleas at different circumstances.



Therefore, firstly, Air India case would not apply. Secondly, though it was contended that there was a ban on recruitment in the operational area there was no such ban. Thirdly, the said Gopakumar having written the examination, he has secured only 39 marks out of 150, therefore, some preference should be given. Therefore, the present appeal is liable to be dismissed, it is argued.

7. Heard the learned Counsel on either side and we have also perused the materials available on record carefully.

8. We find some merit on the submission of the learned Counsel for the appellant. The reason being that when Mr. Gopakumar was working in the appellant Air India from 1993, at the relevant point of time, he has raised Industrial Dispute for his regularization. After raising the dispute, an agreement was reached between the appellant and the 2nd respondent in which it was agreed that as and when any new recruitment process is initiated, the said J.N. Gopakumar would be given preference in giving employment. Since the appellant has also invited applications from the eligible candidates for various posts, it is not in dispute that the said Gopakumar has also applied for the post of Welder and took up the examination on 25.08.2002. Since the cut off mark fixed by the competent authority was 40% for general category and 35% for SC/ST/OBC category, ironically, out of 150 marks, 60 marks has been fixed as cut off mark for General Category whereas 53 marks has been fixed for SC/ST/OBC category. Therefore, the candidates, who secured 53 marks alone is considered to be eligible for the personal interview so far as SC/ST/OBC category is concerned. In the present case, the said Gopakumar has secured only 35 marks out of 150 which is far below the 53 marks, namely, 35%. This factual aspect has been completely overlooked by the learned Central Government Industrial Tribunal-cum-Labour Court, Chennai and also the learned Single Judge of this Court. That apart, since the said Gopakumar has already taken up employment in Qatar Aviation by leaving Air India, no prejudice would be caused to him by allowing the present appeal.

9. In Service Law, one of the pre-conditions seeking regularisation is to show that the employee seeking regularization is in service continuously on the date of passing of the regularization order which means employer and employee relationship exists. If he is not in service prior to regularization, his plea for regularization cannot be considered. It is well settled legal position that an employee seeking regularization of his service should continue in the said service on the date of his request for regularization to be considered. Applying the same yardstick since in the present case, it appears that when Mr. J.N. Gopakumar made a Claim



Petition on 04.08.2005 before the Central Government Industrial Tribunal-cum-Labour Court, Chennai, he was in service of the appellant Air India and during the pendency of the said Claim Petition in I.D.No.46/2005, he had left the service of the appellant because he has taken up employment in Qatar Aviation Authority and was drawing a salary of Rs.80,000/- p.m. and when the writ petition was filed by the appellant herein challenging the award dated 04.12.2006, he was not in service and even today also, he was not in service of the appellant Air India. Therefore, this Court cannot grant the benefit of regularization as the said J.N.Gopakumar is not in service as on today. In this regard, the Hon'ble Supreme Court in U.P.Power Corporation Limited and another vs.Bijli Mazdoor Sangh and others reported in (2007) 5 Supreme Court Cases 755 has held that there cannot be a case for regularisation without there being employee-employer relationship and the concept of regularisation is clearly linked with Article 14 of the Constitution of India. Secondly, when he was out of service, he appeared for the written examination conducted on 25.08.2002 in which he became ineligible as discussed above for personal interview as he secured only 35 marks out of 150 marks which falls below the cut off mark fixed for the candidates belonging to SC/ST/OBC Category i.e. 53 marks.

10. In view of all the above, finding no merit in the impugned Award dated 04.12.2006 passed in I.D.N o.46/2005 by the 1st respondent herein, namely, Central Government Industrial Tribunal-cum-Labour Court, which was confirmed by the learned Single Judge of this Court in W.P.No.22966/2007 dated 05.06.2012, the present appeal stands allowed and the impugned order is set aside. No costs. Consequently, connected Miscellaneous Petition is also dismissed.

Sd/-
Assistant Registrar(CS)

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Sub Assistant Registrar

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To

1. The Presiding Officer,
Central Government Industrial Tribunal-
Cum-Labour Court,
I Floor, 'B' Wing, Shastri Bhavan,
26, Haddows Road, Chennai-600 006.



2. The Regional Secretary-Kerala,
Air India Employees' Guild,
Museum Road, Vellayambalam,
Trivandrum-695 003.

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+1cc to Mr.N.G.R.Prasad, Advocate, S.R.No.21999

+1cc to Mr.K.M.Ramesh, Advocate, S.R.No.22054

W.A.No.903/2016

JP-II (CO)
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