



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.09.2021

CORAM

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

W.P.(MD)No.4960 of 2012

O.Ayyanar

... Petitioner

vs.

1.Murugaraja, (Died)

Proprietor, Sri Jeyanthi Agency,
Hindustan Petroleum Gas Distribution,
No.5, P.S.K.Nagar, Rajapalayam,
Virudhunagar District.

2.The Presiding Officer,
Labour Court, Madurai.

3.Indira

4.Meenambika

5.Muthulakshmi

... Respondents

(R3 to R5 were impleaded as LR's of R1 vide order of this Court, dated 02.09.2021 in M.P.(MD)No.1 of 2013)

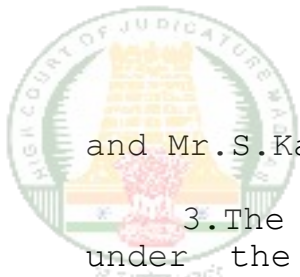
Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, to call for the records relating to the award of the Labour Court in I.D.No.24 of 2009, dated 11.10.2011, and to quash the same insofar as it relates to denial of back-wages is concerned and consequently to direct the first respondent Management to pay full back-wages to the petitioner.

For Petitioner : Mr.S.M.Mohan Gandhi
R1 & R3 to R5 : Mr.S.Karthik

ORDER

This Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, to quash the impugned order passed by the second respondent in I.D.No.24 of 2009, dated 11.10.2011, insofar as it relates to the denial of back wages to the petitioner and consequently, to direct the first respondent management to pay back wages to the petitioner.

<https://hcservices.courtsgov.in/hcservices/> 2. Read in S.M.Mohan Gandhi, learned Counsel for the petitioner



and Mr.S.Karthick, learned Counsel for the respondents 3 to 5.

3.The petitioner was employed as a delivery boy of gas cylinder under the first respondent management for a long time. The petitioner was drawing the salary of Rs.3,000/- per month. Stating that the petitioner was not permitted to attend the work with effect from 17.11.2006, the petitioner raised an industrial dispute in I.D.No.24 of 2009 before the Labour Court, Madurai, alleging that the petitioner was illegally terminated from service. It was the specific case that the petitioner was illegally terminated from service without holding any enquiry. The management admitted that no enquiry was conducted before terminating the service of the petitioner. However, it was pleaded that the first respondent management was prepared to reinstate the petitioner without back wages. It was contended before the Labour Court that against the petitioner, several complaints from the consumers were received and that the first respondent has no other option, but to terminate the service of the petitioner for the serious irregularities committed by him.

4.The Labour Court came to the conclusion that the termination of the petitioner was illegal, as no procedure was followed before orally terminating the service of the petitioner. Considering the fact that the petitioner was not willing to accept reinstatement and to get employment once again under the first respondent management, the Labour Court, while directing reinstatement of the petitioner with continuity of service, held that the petitioner is not entitled to back wages. Questioning that portion of the award refusing to grant back wages to the petitioner, the above Writ Petition is filed.

5.The learned Counsel appearing for the petitioner submitted that the petitioner was illegally terminated from service and that therefore, it is a case of wrongful termination of service and that reinstatement with continuity of service and back wages should be the normal rule.

6.The learned Counsel for the petitioner also relied upon the judgment of the Honourable Supreme Court in the case of **Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others**, reported in (2013) 10 SCC 324, wherein, the Honourable Supreme Court after considering several judgments, came up with the following propositions:

"38.The propositions which can be culled out from the aforementioned judgments are:

38.1.In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2.The aforesaid rule is subject to the rider that



of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employers obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra)*.

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal (supra)* that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

7. It is no doubt true that in case of wrongful termination, reinstatement with continuity of service with back wages is the normal rule. However, there are several exceptions, that have been culled out by the Honourable Supreme Court. Even in the judgment referred to/relied upon by the learned Counsel appearing for the petitioner, it is stated that the adjudicating authority may take into consideration the length of service of employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and several other factors.



8. In the present case, there is a specific allegation that the petitioner was gainfully employed, when he was out of employment. The learned Counsel for the respondents 3 to 5 would only point out that the petitioner was doing some service by posing himself as an employee of the first respondent. From the allegations, it cannot be taken that the petitioner was gainfully employed, as there is no sufficient material was produced by the first respondent before the Labour Court. As it was held by a catena of cases, unless the employer lead evidence to prove the positive fact that the employee was gainfully employed, it is not possible to hold that the employee was gainfully employed. In the present case, the allegation against the petitioner was that he demanded more money from the consumers and that based on the complaints received from the consumers, the petitioner was not given employment. The first respondent has produced the complaints received against the petitioner from the consumers before the Labour Court. However, no one was examined. In the said circumstances, this Court is not inclined to accept the case of first respondent that the petitioner was gainfully employed.

9. As it has been reiterated by a few judgments of the Honourable Supreme Court and this Court, reinstatement or back wages though is a normal rule, it is not mandatory in every cases that the employee should be reinstated with back wages, even if the termination is illegal. The first respondent is a small businessman and he runs business by distributing gas cylinders to several consumers by employing delivery boys. The nature of business run by the first respondent would show how the petitioner might have been engaged. Even before the Labour Court, the petitioner has refused to accept the reinstatement on the ground that the first respondent had decided to close down the business.

10. Even assuming that the petitioner has an apprehension, refusing to get reinstatement under the same salary, it gives an indication that the volume of business the first respondent had at that time. Asking a small timer, like the first respondent to pay back wages for the period during which the petitioner did not work under the first respondent, is also a factor to weigh this Court to decide whether the petitioner is entitled to reinstatement with back wages. The petitioner challenged the oral termination in 2009, after a period of nearly three years. Though the petitioner has sufficient reasons for the delay, the first respondent cannot be asked to pay back wages to the petitioner, who was just employed as a delivery boy and whose termination though was vitiated for non observance of minimum procedure, the same cannot be considered inhuman or immoral. Having regard to the nature of business conducted by the first respondent, directing the first respondent to pay back wages to the petitioner will certainly affect the livelihood of the first respondent.



11.Having regard to the reasons indicated above, This Court is not inclined to entertain this Writ Petition. Accordingly, this Writ Petition is dismissed. However, there is no order as to costs.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

cmr/nsr

To

The Presiding Officer,
Labour Court, Madurai.

Copy to:-

The Section Officer,
VR.Section,
Madurai Bench Of Madras High Court,
Madurai.

+1 CC to M/s.S.KARTHIK, Advocate (SR-28135[F] dated 03/09/2021)

W.P. (MD) .No.4960 of 2012
02.09.2021

RD(1.10.2021) 6P 5C