



Rev.A.Nos.155 and 156 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	27.04.2023
DELIVERED ON	18.07.2023

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HON'BLE MRS.JUSTICE R.KALAIMATHI

Rev.A.Nos.155 and 156 of 2019
& C.M.P.Nos.5616, 16872, 16858 & 16868 of 2019
in W.A.Nos.1549 and 1550 of 2012

Rev.A.Nos.155 of 2019

1. The Management of Sundaram Fasteners Ltd.,
Registered Office,
98A, Dr.Radhakrishnan Salai,
Chennai-600 004.

2. Sundaram Fasteners Ltd.,
Harita, Hosur,
Dharmapuri District,
Rep. by Vice President.

... Petitioners / Appellants

-VS-

1. The Presiding Officer,
Labour Court, Salem.

2. S.Kannadhasan

... Respondent/Respondents

Prayer: Review Application is filed under Order 47 Rule 1 r/w Section 114 of C.P.C., to review the judgment of this Hon'ble Court dated 18.01.2018 in W.A.No.1549 of 2012 and pass appropriate orders.

For Applicants : Mr.Anand Gopalan
For M/s.T.S.Gopalan & Co.
For R1 : Labour Court



Rev.A.Nos.155 and 156 of 2019

For R2

: Mr.V.Prakash, Sr. Counsel
For Mr.K.Sudalai Kannu

WEB **Rev.A.Nos.156 of 2019**

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For M/s.T.S.Gopalan & Co.
For R1 : Labour Court
For R2 : Mr.V.Prakash, Sr. Counsel
For Mr.K.Sudalai Kannu

COMMON JUDGMENT

(Common Judgment of the Court was made by **S.VAIDYANATHAN, J.**)

These Review Applications have been filed to review the common judgment dated 18.01.2018 passed in W.A.Nos.1549 and 1550 of 2012.



Rev.A.Nos.155 and 156 of 2019

2. For the sake of brevity, the parties are referred to as 'the Management' and 'the Workman'.

Case put forth by the Workman:

3. The Workman was employed as a Trainee on 14.06.1997 in the Hosur Factory of the Management on consolidated salary of Rs.1,675/- and since more than 100 workers were working in the Management's establishment, it is covered under Chapter V-B of the Industrial Disputes Act, 1947 (in short 'the I.D.Act, 1947'). Though the Workman was engaged as a Trainee, no training was imparted and was straightaway made to do the work;

3.1. On 09.07.1998, the Workman was issued an order of appointment with the designation Work Apprentice with a consolidated pay of Rs.1,925/- for a period of 12 months ending 31.07.1999 and on the expiry of one year, he was not ousted from service, instead he was paid a salary under the head “conveyance allowance”. He was once again issued an appointment order on 09.08.1999, appointing him as “Operative Trainee” on temporary basis with a consolidated pay of Rs.2,175/- plus other allowance of Rs.250/- per mensem for a period of one year ending 31.08.2000 and he was asked to submit applications during every appointment;



Rev.A.Nos.155 and 156 of 2019

3.2. Subsequent thereto, the nomenclature of the Workman's post was changed to “Operative Trainee Probationer” with effect from 12.09.2000 on a consolidated salary of Rs.3,600/- per mensem and the probation period was for six months, which was extended upto 30.09.2001 under order dated 25.05.2001. Hence, the service of the Workman was a continuous one and had completed two years of continuous service without any break and had worked more than 480 days of service. Mere appointment of the Workman as a Trainee at the initial stage does not take away his status as Workman as stipulated under Section 2(s) of the I.D.Act, 1947, as PF contribution was also deducted from his wages;

3.3. In terms of The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981, it is obligatory on the part of the Management to confer permanency to those, who had completed 480 days of work within a period of 24 calendar months, more so, in the light of Section 3 that has a deeming effect. When applications were made by some of the Workers for permanency, they were immediately terminated by the Management. The 2nd respondent / Management issued a letter in the month of February, 2002, falsely alleging that his performance during the



Rev.A.Nos.155 and 156 of 2019

probationary period was not satisfactory and the same was extended upto 31.03.2002;

3.4. On 30.03.2002, the Workman was called upon to submit a letter of resignation and forced to accept a settlement of Rs.70,000/-, which was refused by the Workman, pursuant to which, he was not allowed to work in any of the shift. Thereafter, the Management stated that his probationary employment had come to an end with effect from 31.03.2002 and a cheque for Rs.7,200/- was enclosed towards notice pay and retrenchment compensation. The Workman made several representations dated 31.03.2002, 04.04.2002 and 08.04.2002 against his termination and also returned the cheque of Rs.7,200/-;

3.5. The Workman, as against his termination, had raised an Industrial Dispute under Section 2-A of the I.D.Act, 1947 before the Labour Officer, Krishnagiri in I.D.No.209 of 2005, in which compensation was granted to the Workman without granting any relief in respect of permanency. Aggrieved by the same, both the Management and the Workman preferred two Writ Petitions in W.P.Nos.22076 and 29671 of 2007, wherein learned Single Judge passed the following order:



Rev.A.Nos.155 and 156 of 2019

“22. In the light of the above, the impugned award insofar as the petitioner is concerned is modified and the Workman is entitled to get reinstatement with backwages and continuity of service and other attendant benefits. Hence, W.P.No.29671 of 2007 filed by the workman stands allowed. W.P.No.22076 of 2007 filed by the Management stands dismissed.....”

4. Challenging the order of the learned Single Judge, the Management had filed W.A.Nos.1549 and 1550 of 2012, which came to be dismissed by a Division Bench on 18.01.2018, on the ground that no document evidence was produced to establish that the Workman was terminated on review of performance of his work as well as the situation of the company.

5. On the side of the Management, it was urged that the Management is a member of the TVS Group of Companies and the factory is run as a family unit with the permanent Workmen and regular employees. At the time of appointment for training as well as for apprenticeship, the candidates were clearly informed that there was no guarantee for permanency and their job was purely on temporary basis. The cessation of employment of the Workman as a probationer was fully justified and the learned Single Judge ought not to have granted the relief of permanent status.

6. The Management, in support of these Review Applications



Rev.A.Nos.155 and 156 of 2019

strenuously submitted that the Division, while upholding the order of the learned Single, failed to decide on the question of permanent status and the grant of reinstatement with continuity of service, full backwages and other attendant benefits would be a double time bonanza to a Workman, who had rendered only for 2½ years of service and the judgment of the Division Bench is against the settled position of the Supreme Court that back wages is not automatic. The next point urged for review of the judgment was that in the absence of the pleading of the Workman that he had not been gainfully employed, he would not be entitled to any backwages. According to the Management, it is a case of termination *simpliciter* and not a case of retrenchment.

7. The Workman has filed a counter affidavit to these Applications stating that he was not gainfully employed, as he was residing with his parents and was assisting his father in agriculture until 2014. During pendency of the Writ Petitions, no application under Section 17-B of the I.D.Act, 1947 was filed for the reason that there was no order for reinstatement and both writ petitions were decided by a common order, thereby the award of the Labour Court was modified. It was also stated that



Rev.A.Nos.155 and 156 of 2019

after the demise of his father, he took up temporary employment in Bangalore and that he had not committed any act of perjury. The order of this Court has not been complied with till now and the Management had not reinstated him in service.

8. Mr.Anand Gopalan, learned counsel for the Management submitted that there is no provisions for automatic reinstatement, as it must flow in consequence of a direction / finding that the punishment is harsh and excessive. In this case, there was no illegal termination or victimization of the Workman and therefore, in the absence of any such direction, the question of automatic reinstatement does not arise at all. In support thereof, he relied on a judgment of the Supreme Court in the case of **J.K.Synthetics Ltd., vs. K.P.Agrawal and another**, reported in **(2007) 2 SCC 433**, wherein it has been held as under:

“19. But the cases referred to above, where back-wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the court found that the termination was motivated or amounted to victimization. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser



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punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any Court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back-wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions etc.



20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back-wages etc. will be the same as those applied in the cases of an illegal termination.

21. In this case, the Labour Court found that a charge against the employee in respect of a serious misconduct was proved. It, however, felt that the punishment of dismissal was not warranted and therefore, imposed a lesser punishment of withholding the two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all.

8.1. Learned counsel for the Management, by referring to the judgment of the Apex Court in the case of *Kendriya Vidyalaya Sangathan and another vs. S.C.Sharma*, reported in (2005) 2 SCC 363, further submitted that it is for the Workman to establish that there was no gainful employment in the interregnum, supported by material documents, in the absence of which, the burden of proof cannot be shifted to the employer to rebut the claim of the Workman. The relevant paragraph of the said judgment is extracted hereunder:

“16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside.



Rev.A.Nos.155 and 156 of 2019

When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.”

8.2. Learned counsel for the Management also cited a judgment of the Supreme Court in the case of **Rajasthan State Road Transport Corporation, Jaipur vs. Phool Chand (Dead) through Legal Representatives**, reported in **(2018) 18 SCC 299** to emphasize that initial burden is only on the employee to prove the non-employment, through the employer is also entitled to prove otherwise. Paragraph No.12 of the judgment is extracted below:

“12. It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, namely, that the employee was gainfully employed during the relevant period and hence not entitled to claim any back wages. Initial burden is, however, on the employee.”

Hence, it was vehemently argued by the learned counsel for the Management that the order of the Division Bench needs to be reviewed, insofar as there was no finding regarding automatic reinstatement even if it is held that



Rev.A.Nos.155 and 156 of 2019

termination of the employee was bad in law.

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9. Per contra, learned Senior Counsel for the Workman opposed the review of the judgment of the Division Bench solely on the ground that the Court can entertain such review petition, if it is found that there was a glaring omission or patent mistake apparent on the face of the record and in the absence of the same, a judgment passed by the Division Bench cannot be put to test in the form of review that alternative view is possible under review jurisdiction. He relied on the judgment of the Supreme Court in this regard in the case of Union of India (UOI) vs. Sandur Manganese and Iron Ores Ltd. And others, reported in MANU/SC/0417/2013, wherein it was held as follows:

“24) In the present case, the error contemplated in the impugned judgment is not one which is apparent on the face of the record rather the dispute is wholly founded on the point of interpretation and applicability of Section 11(2) and 11(4) of the MMDR Act. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Hence, in review jurisdiction, the court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment, which we fail to notice in the present case.



Rev.A.Nos.155 and 156 of 2019

25) For the above reasons, the second ground for review petition is liable to be rejected.”

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

11. The core contention of the Workman was that he had completed more than 480 days of service in a period of 24 calendar months and he served as Work Apprentice and Operative Training for three years (of course on extension of service every year) and thereafter, he was kept under probation for one and half year. Thus, it was the claim of the Workman that he should have been absorbed in service on permanent basis as per the provisions of The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981. Learned Single Judge allowed the Writ Petition filed by the Workman and dismissed the Writ Petition preferred by the Management, by relying on the judgment of the Supreme Court in the case of Harjinder Singh vs. Punjab State Warehousing Corporation, reported in (2010) 3 SCC 192, wherein it was held that denial of reinstatement of workmen will be illegal and the workmen are entitled to normal relief of reinstatement and backwages. However, it is pertinent to mention here that the Supreme Court in a number of cases laid down a



Rev.A.Nos.155 and 156 of 2019

proposition that entitlement to full backwages is not automatic, when the dismissal is set aside on illegalities. It was pleaded by the Workman that the act of the Management in terminating the services of the Workman does not fall under the provisions of Section 2(oo)(bb) of the Industrial Disputes Act, 1947, rather it can be construed as only retrenchment within the specified meaning of Section 2(oo) of the I.D.Act, 1947, on the reasoning that Section 2(oo)(bb) of the I.D.Act, 1947 is not applicable to the facts of this case, because the Workman had attained permanent status and there cannot be any probation beyond the maximum period of probation prescribed. Moreover, the Management had not obtained any prior permission from the Authority concerned as adumbrated under Chapter VB of the I.D.Act, 1947 for termination of the Workman.

12. According to the Management, the services of the Workman have come to a halt on account of non-satisfactory work at the end of the probationary period and therefore, the question of applicability of Chapter VB of the I.D.Act, 1947 does not arise at all. The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981, cannot be made applicable to the case on hand after cessation of the employer



and employee relationship.

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13. Under the Industrial Law, the Nagpur Bench of the Bombay High Court in the case of *Dilip Hanumantrao Shirke vs. Zilla Parishad, Yavatmal* reported in *1990 (I) LLJ 445* has held that, amended sub-clause (bb) of Section 2 of the Industrial Disputes Act, 1947 would apply to such cases where the work ceases with the employment or the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and bonafide. For better appreciation, relevant portion of the said decision is extracted hereunder:

“7. ... A stipulation in the contract that the employment would be for a specific period or till completion of the work may also fall within the scope and ambit of this sub-clause. But, if the employer resorts to contractual employment as a device to simply take it out of the principle clause (00) irrespective of the fact that the work continues or the nature of duties which the workman was performing are still in existence, such contractual engagements will have to be tested on the anvil of the fairness, propriety and bona fides. May be that such fixed tenure employments are made to frustrate the claim of the workman to become regular or get himself confirmed as a permanent employee either under the Rules applicable to such employment or even under the Standing Orders. It is always open to the Court adjudicating the dispute to examine each and every case in its proper perspective and to protect the workman against the abuse of the amended provision. If this protection is not afforded, the benefit flowing from retrenchment, to which every termination succumbs, would be rendered nugatory. The amended sub-clause



Rev.A.Nos.155 and 156 of 2019

(bb) would apply only to such cases where the work ceased with the employment or the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and bonafide. ...”

14. It is also worth referring to yet another decision under Industrial Law rendered by the Punjab & Haryana High Court in the case of Balbir Singh vs. Kurukshetra Central Co-op Bank reported in (1990) 1 LLJ 443, wherein, it is held that, the employer cannot resort to frustrate the claim of the employee to deny benefits. Relevant portion of the said decision is extracted hereunder:

“7. ... The contractual clause enshrined in Clause (bb) cannot be resorted to frustrate the claim of the employee against his uncalled for retrenchment or for denying other benefits. It cannot be so interpreted as to enable an employer to resort to the policy of hire and fire and to confer unguided power on the employer to renew or not to renew the contract irrespective of circumstances in which it was entered into or ignore the nature and extent of work for, which he was employed.”

15. The Hon'ble Apex Court, in similar circumstances, elaborately dealt with the issue in the case of Wasim Beg v. State of Uttar Pradesh and Others, reported in AIR 1998 SC 1291, with regard to declaration of probation and the proposition reads as under:

"16. However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended.



Rev.A.Nos.155 and 156 of 2019

16. There was a categorical finding by the Labour Court that based on the evidence of the Management, the Workman was paid wages under the head "Conveyance Allowance" and the order of termination was in the form of victimization of the Workman. There is also no evidence to show that the Workman has been imparted training. Of course, it is a finding of fact, which cannot be gone into at this stage.

17. It was brought to our attention by the Management that the Workman was gainfully employed and suppressing this fact, he has been drawing 17-B wages being paid by the Management. The Management has also carved out a Miscellaneous Petition in this case for initiation of action against the Workman for committing the offence of perjury. In support of this petition, it was stated that there was no whisper in the affidavit. This contention cannot be accepted for the simple reason that at the time of filing the affidavit, the Workman was not in the employment and hence, the Management cannot take a shelter to punish the Workman for the act of perjury. Hence, the C.M.P.No.5616 of 2023 cannot be allowed.

18. In the Computation Petition, the Workman had not stated about his gainful employment. Of course, the burden is on the Management to prove the gainful employment. In this case, the Management had duly proved it and



Rev.A.Nos.155 and 156 of 2019

the Workman ought to have deducted the amount drawn under the new Management and filed the Computation Petition. To that extent, there is a fault on the part of the Workman for filing a false statement before the Labour Court.

19. The basic principle to entertain the review under Order 47 Rule 1 C.P.C. is to correct the errors, but not to substitute a view. Even though a Division Bench of this Court in the case of **R.Mohala vs. M.Siva and others**, **[Review Petition No.61 of 2018] decided on 25.04.2018**, in which one of us (SVNJ) was a member had discussed as to when Review is not maintainable, in the case on hand, except re-production / extract of the operative portions of the order of the Writ Court, there was no further discussion made by the Division Bench with regard to the relief granted to the Workman by the Writ Court. Therefore, the judgment is liable to be reviewed under Order 47 Rule 1 of C.P.C. On review, the Workman cannot be granted relief in view of the fact that there was a suppression on his part, as he had not brought to the attention of the Labour Court, Hosur now in C.P.No.18 of 2022 about his gainful employment. There is a catena of judgments to the effect that an employee would not be entitled to 100% backwages, even though there is a



Rev.A.Nos.155 and 156 of 2019

violation of Section 25-F of the I.D.Act, 1947 or direction for reinstatement after holding that charges are not proved. In the case on hand, the Workman has come up with unclean hands by filing a false statement on oath in the Computation Petition, for which, he may be punished under the Penal Provisions, viz., Sections 191, 199 IPC or any other provisions of Indian Penal Code, more so, Section 193 of IPC as contemplated under Section 11(3) of the I.D.Act, 1947 read with Sections 195 and 340 Cr.P.C.

20. However, in order to give quietus to the issue, these ***Review Applications are allowed and the Writ Appeals filed by the Management are partly allowed*** with the following orders:

i) The wages paid under Section 17-B shall not be adjusted, as, instead of awarding 50% backwages and thereafter, ordering deduction of wages paid under Section 17-B, we order 25% backwages only for the non-employment period. While awarding only 25% backwages, we direct the Management to reinstate the Workman in service with continuity of service and other attendant benefits within a period of four months from the date of receipt of a copy of this judgment and paid on par with other Workmen;



Rev.A.Nos.155 and 156 of 2019

WEB COPY ii) The employer and employee contributions towards PF for the actual salary the Workman would be drawing, but for the retrenchment, needs to be paid, if not already paid, for the entire services upto the date of gainful employment;

iii) The Provident Fund share of employer and employee will have to be paid only by the employer within a period of four months from the date of receipt of a copy of this judgment. Since the wages have been directed to be paid only now, the EPFO cannot demand damages from the employer / Management, but, however, the interest will have to be paid. If there is any delay in remittance of the amount after the expiry period stipulated in this judgment, it is open to the EPFO to claim the same from the date of this judgment and also proceed to levy damages in accordance with law.

21. It is made clear that in case of non implementation of the judgment, it is open to the Workman to file a complaint under Section 29 of the Act, seeking prosecution against the persons falling under Section 32 of the Act, for which, there is no need to add the management as a party, and the Government is bound to sanction prosecution, as there cannot be any delay,



Rev.A.Nos.155 and 156 of 2019

in the light of the decision of the Supreme Court in *The Life Insurance*

Corporation of India Ltd. v. D.J.Bahadur and Others, 1980 AIR 2181, in

which, the ratio laid down was that the settlement or award will continue to be in force till such time it is substituted / replaced by another settlement or award. It is further made clear that in case the Computation Petition is proceeded with, the Industrial Tribunal or Labour Court is empowered to punish the Workman for the act attracting the provisions of IPC. Only after invocation of Section 193 IPC in view of Section 11(3) of the I.D.Act, 1947, the Labour Court, Hosur is empowered to proceed with C.P.No.18 of 2022 on merits pending before it. No costs. Consequently, connected Miscellaneous Petitions are closed.

[S.V.N,J.] [R.K.M,J.]
18.07.2023

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S.VAIDYANATHAN,J.
AND
R.KALAIMATHI,J.
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Rev.A.Nos.155 and 156 of 2019

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To:

The Presiding Officer,
Labour Court,
Salem.

PRE-DELIVERY JUDGMENT IN
Rev.A.Nos.155 and 156 of 2019
in W.A.Nos.1549 and 1550 of 2012

18.07.2023