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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.06.2023

CORAM

THE HONOURABLE MR. JUSTICE V. LAKSHMINARAYANAN

W.P.No. 15960 of 2014

K.Subramanian

... Petitioner

..Vs..

1. The Presiding Officer
II Additional Labour Court
High Court Buildings
Chennai 600 104.

2. The Management of Mercury Travels Ltd.,
No. 191, Anna Salai, Chennai 600 002.

... Respondents

PRAYER: Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus calling for the concerned records from the first respondent quash the order of the first respondent Labour Court passed in C.P.No. 577 of 2011 in so far as computing the back wages payable as Rs.4,11,800/-, declining the claim for increment, bonus and LTC as illegal, arbitrary and contrary to law and consequently direct the 2nd respondent to pay Rs.21,00,127/- towards back wages, increments, bonus and festival holidays for the period from 28.10.1998 to 28.02.2011 along with interest at the rate of 18% per annum.



For Petitioner

:: Mr. Balan Haridass

For 2nd Respondent:: Mr. K.Rankesh
for M/s. Jayaraman & Associates**ORDER**

The petitioner challenges the order passed in C.P.No. 577 of 2011 dated 24.02.2014.

2. The petitioner was appointed as stenographer by the second respondent / Management on 13.08.1984. On the ground of non performance, he was terminated from service on 27.10.1998. The termination was not on the grounds of misconduct or misappropriation etc., but on the ground of non performance in the role as an Accounts Executive. The termination order was put in challenge before the authorities under Tamil Nadu Shops and Establishments Act, 1947 by way of an Appeal as T.S.E.No. 33 of 1998. The said authorities has passed an order on 17.01.2001 setting aside the termination order.



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3. The order dated 17.01.2001 passed by the authorities was challenged by the second respondent/Management before this Court in W.P.No. 8695 of 2001. The Writ Petition was dismissed on 21.06.2010. The second respondent/Management reinstated the petitioner on 06.09.2010. The petitioner has retired from service in the year 2016.

4. After reinstatement, the petitioner claimed that he is entitled for back wages, continuity of service and attendant benefits and filed C.P.No. 577 of 2011. He claimed an amount of Rs.25,10,035/-. Pending the proceedings, the workman had been paid a sum of Rs.4,09,908/- by the second respondent/Management and after adjusting this amount as against the claim, he sought for payment of Rs.21,00,127/-.

5. This was resisted by the second respondent/Management on the ground that the authorities under Tamil Nadu Shops and Establishments Act, 1947 did not give any direction for payment of back wages. The order which was confirmed by the High Court, also did not give any direction for payment of back wages. They also rejected the claim of the petitioner for



increments on the ground that annual increment is not automatic and it is based on performance. Similarly, since the petitioner was a trainee Account Executive, he was not entitled to special allowances attached to the post. On the same ground, the request for leave travel concession and festival charges was also resisted by the Management.

6. The Lower Court took into consideration that there has been no direction by the authorities under the Tamil Nadu Shops and Establishments Act, 1947 or by this Court in W.P.No. 8695 of 2001 and consequently, dismissed the Computation Petition.

7. The Lower Court came to a conclusion that the petitioner is not entitled to more than Rs.2,61,800.00/-. The sum has been calculated on the basis of Rs.5,800/- from the period 08.10.1998 till 05.09.2010 (in all 142 months) and after giving credit to fixed deposit amount of Rs.1,50,000/-. It directed payment of Rs.2,61,800/-.

8. On a query, the learned counsel for the second respondent/Management stated that the amount of Rs.2,61,800/- has not



been paid. Aggrieved over the partial rejection of the claim, the present

Writ Petition has been filed.

9. I heard Mr. Balan Haridas, learned counsel appearing for the petitioner and Mr.K.Rangesh for M/s. Jayaraman & Associates, learned counsel appearing for the second respondent.

10. Learned counsel appearing for the second respondent/Management would vehemently contended that there is no direction for payment of back wages by the authorities under Tamil Nadu Shops and Establishments Act, 1947 in T.S.E.No. 33 of 1998 nor was such a direction was given in W.P.No. 8695 of 2001. According to him, since there is no direction, the liability of the second respondent/ Management to pay the amount does not arise at all. I am not agreeable with the statement made by the learned counsel for the second respondent/Management on two specific grounds:-

(i) This very argument was pressed before the Labour Court and it was rejected by the Labour Court. The said order has not been put into challenge before the High Court. Therefore, it is not open to the second



respondent/Management to state that the authority under the Tamil Nadu Shops and Establishments Act, 1947 does not have the jurisdiction to order back wages;

(ii) I do not want to raise my conclusion only on the basis of the non challenge of the order in C.P.No. 577 of 2011. It requires a probe of Section 41 of the Tamil Nadu Shops and Establishments Act, 1947.

11. Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 reads as follows:-

“41. Notice of dismissal. -

(1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one months notice or wages in lieu of such notice, provided however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of



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misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2) The person employed shall have a right to appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

[(2A) The appellate authority may, if it considers that any document or the testimony of any person is relevant or necessary for the discharge of its duties under this Act as appellate authority, call for and inspect such document or summon and examine such person. For the aforesaid purposes, it shall have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 (Central Act V of 1908), in respect of the following matters, namely:-

(i) summoning and enforcing the attendance of any person and examining him on oath;



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(ii) *compelling the production of documents;*

(iii) *issuing commissions for the examination of witnesses*

(2B) *The appellate authority, may, after giving notice in the prescribed manner to the employer and the person employed, dismiss the appeal or direct the reinstatement of the person employed, with or without wages for the period he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case.]*

(3) *The decision of the appellate authority shall be final and binding on both the employer and the person employed.*

[41A. Payment of full wages to person employed pending proceedings in Higher Courts. - *Where in any case, the appellate authority, by its decision under Section 41, directs reinstatement of any person employed and the employer prefers any proceeding against such decision in a High Court or the Supreme Court, the employer shall be liable to pay such person*



employed, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the person employed had not been employed in any establishment during such period and an affidavit by such person employed had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such person employed had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.] ”

12. This Act has suffered an amendment only in the year 2008 by introduction of Section 41-A which speaks about back wages, etc. This is a case which has been arisen prior to the date of amendment and therefore, it is the unamended law which is applicable to the facts of the case.



13. As per the unamended law, the authorities under the Tamil Nadu Shops and Establishments Act, 1947 could have only stated whether the order of dismissal / discharge is illegal or legal. He could at best declares that the termination / dismissal / discharge is not in accordance with law. The Act did not empower him to specifically speak about payment of back wages, continuity of service or other attendant benefits.

14. It is here the Judgment of this Court in ***TISCO Vs. G.Ramakrishna Ayyar and another [1950) LLJ 1043 Mad]*** becomes relevant. A Division Bench headed by Chief Justice Mr.P.V.Rajamannar & Mr. Justice A.Vishwanatha Sastri were called upon to decide about what is the effect of the order of the authority under the Tamil Nadu Shops and Establishments Act, 1947 in ordering reinstatement.

15. A reading of the dictum of the Division Bench makes it very clear that the order of termination once declared as non est, the resultant consequences follows. This view of the Division Bench found acceptance by another Division Bench in ***E.Senthil Kumar Vs. Registrar of Co-operative Societies and another [1995 SCC Online Mad 918]***.



16. However, Mr. Rankesh, learned counsel appearing for the second respondent would immediately bring to the Judgment of this Court in *the Atomic Energy Employees Consumer Co-operative Stores Ltd., Vs. A.K. Chidambaram and Ors., in W.A. Nos. 1759 & 1760 of 2014 dated 10.02.2015*. He would point out from the said Judgment that the view taken in *E. Senthil Kumar's* case had been declared as implied with rule and therefore, there is no question for any automatic payment of the installment of the workman.

17. I have to point out here that subsequently, the Supreme Court had taken a view in *Nandkishore Shravan Ahirrao Vs. Kosan Industries Pvt. Ltd., [2021(14) SCC 781]* to the effect that where reinstatement is ordered, continuity of service has to follow as a matter of law. Reading the Judgment of the Supreme Court in conjunction with the view taken by this Court in *TISCO's* case, I have to necessarily come to the conclusion that once the order is declared as non est, the consequence would be that the person is deemed to be in service and therefore, it would have to be treated as if he was entitled as of a right to receive the benefits of the office in which he is occupying.



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18. The learned counsel also bring to my notice an another recent Judgment of the Supreme Court in ***OM Pal Singh Vs. Disciplinary Authority in Civil Appeal No. 176 of 2020 dated 14.01.2020***. He would state that the Supreme Court had approved the view in ***J.K.Synthetics Ltd., Vs. K.P.Agrawal [(2007) 2 SCC 433]***. He would therefore vehemently argue that the shops and establishment authority not having granted the back wages and continuity of service, it should deemed to have been rejected.

19. At the first blush, the arguments seems to be attractive. However, reading ***J.K.Synthetics Ltd.,*** case, one can note that it does not apply to a case under the Tamil Nadu Shops and Establishments Act, 1947 but relates to cases where Tribunals or Courts have been empowered not only to set aside the order of dismissal and discharge but to further order reinstatement together or without back wages.



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20. Further in **Deepali Gundu Surwase vs Kranti Junior Adhyapak & Ors** [(2013) 10 SCC 324] dated 12th August, 2013, the relevant portions are extracted hereunder:-

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

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid



payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.”

21. As pointed out above, Section 41 of the Tamil Nadu Shops and Establishments Act, 1947, prior to the amendment of the year 2017, all that the authority could declare was whether the order suffers from any illegality or whether the order is legal. In such a situation, one cannot expect the authority to pass an order on backwages etc., which he was not specifically empowered under Act to do. Therefore, the Judgment of the **J.K.Synthetics Ltd.**, case also is not applicable to the facts of this case.



22. The Labour Court has already decided that the petitioner is entitled to Rs.2,61,800/-. It is also on record that the petitioner has retired from service in the year 2016 and a litigation should not be a wind fall to a litigant. Exercising power under Article 226 of the Constitution of India, this Court partly allowed the Writ Petition.

23. The petitioner would be entitled to a sum of Rs.7,00,000/-. This amount includes the sum of Rs.2,61,800/- that has been already ordered by the Labour Court. I am only enhancing it by Rs.4,38,200/- which in addition to the aforesaid figure and rounded to Rs.7,00,000/-.

24. With the above direction, this Writ Petition stands allowed. No costs.

21.06.2023

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Index: Yes/No

Internet: Yes/No

Speaking / Non Speaking Order

V. LAKSHMINARAYANAN, J.,



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To

The Presiding Officer
II Additional Labour Court
High Court Buildings
Chennai 600 104.

W.P.No. 15960 of 2014

22.06.2023