IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.04.2023

Pronounced on : 23.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.A. No.2389 of 2018 and
C.M.P. No.19187 of 2018

The Management,
Tamil Nadu Handloom Weavers' Co-operative Society Ltd., (Co-optex)
Rep. by its Regional Manager,
Chidambaram Road,
Cuddalore. ... Appellant

-vs-

1.The Deputy Commissioner of Labour,
Office of the Commissioner of Labour,
Chennai 600 006.

2. Tmt. Vanathidevi ... Respondents

PRAYER: Writ Appeal is filed under Clause 15 of the Letters Patent, praying to set aside the order dated 21.01.2016 in W.P.No.21349 of 2003 passed by this Court.

For Appellant : Mr.S.Silambarasan, Senior Advocate
for M/s.Jayaraman and Associates

For Respondents : Mr.S.John J.Raja Singh,
Additional Government Pleader for R1;
Mr.V.S.Sivasundaram for R2

J U D G M E N T

(Judgment of the Court was made by S.Vaidyanathan, J.)

This Writ Appeal has been filed by the appellant Society, challenging the order of the learned single Judge passed in W.P.No.21349 of 2003, dated 21.01.2016, whereby the order of the 1st respondent authority finding that the termination of the 2nd respondent herein without issuing the mandatory notice in terms of Section 41 of the Tamil Nadu Shops and Establishment Act 1947 and Section 25-F of the Industrial Dispute Act, 1947 is bad. The relevant portion of the learned Single Judge order is extracted hereunder:

"10. In the instant case, the second respondent produced 30 documents, which are all records pertaining to the payment of salary. These records have not been disputed by the petitioner Management. Therefore, it is not a case as pointed out by the Hon'ble Supreme Court in the case of Manager, Reserve Bank of India vs. S.Mani & Ors., (supra), where the Hon'ble Supreme Court held on fact that the onus of proof had not shifted on the employer. However in the instant case, the records produced by the second respondent are records pertaining to her salary details and 30 documents have been produced. The Management did not seek to cross examine the second respondent on those documents rather those documents have been accepted. In such circumstances, the onus of proof would definitely shift on the Management to establish that those documents does not in any manner establish the continuous employment of the second respondent. In such circumstances, the first respondent authority was justified in coming to a conclusion that the Management did not discharge the onus of proof cast upon them in the light

of the documents which were placed by the second respondent before the authority. Infact the counter statement filed by the Management was a bald denial while accepting the fact that the second respondent's services have been engaged in the Sales Depot. The provisions of the Shops and Establishment Act has been enacted to protect the interest of the workman from being exploited and to prevent unfair labour practice engaging a workman on daily wages continuously and by giving artificial breaks would prove that there is a need for the post. When the first respondent on facts was satisfied that the second respondent had completed more than 240 days of continuous employment, the relief granted to the second respondent was justified. The second respondent cannot be non-suited on the ground that there are service Rules framed by the petitioner Management and recruitment should be in accordance with the service Rules. However, it is to be noted that the second respondent has not approached this Court to issue a Writ of Mandamus to regularise her services rather she went before the competent authority by invoking the provisions of the Tamil Nadu Shops and Establishment Act and prayed for reinstatement as a permanent employee. The authority adjudicated the case and rendered a factual finding that the second respondent has completed more than 240 days of continuous employment. Therefore, the order passed by the first respondent is a result of an adjudication and therefore, the second respondent cannot be nonsuited by contending that the proper recruitment process was violated while engaging the services of the second respondent. Infact, the complaint of the second respondent before the authority was that she was being unfairly dealt with and retained as a daily wage earner for almost two decades.

11. Thus, in the absence of any perversity in the order passed by the first respondent, the same does not call for any interference. Accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed."

2. The Writ appeal has been filed challenging the order of the learned Single Judge interalia on the following grounds viz.,

a. The 2nd respondent who was only appointed as a temporary employee could not have sought permanency while challenging her termination under Section 41 of the Tamil Nadu Shops & Establishments Act, 1947 even assuming that she has worked for more than 240 days in a year as for seeking permanency she has to put up a continuous service of 480 days and more in terms of Section 3 of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981.

b. The 2nd respondent ought to have approached the authority prescribed under the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981.

c. The Appellate Authority prescribed under the Tamil Nadu Shops and Establishments Act, 1947 is only vested with the powers of setting aside the order of termination and is not vested with any powers to confer permanency.

d. That the 2nd respondent was not recruited through employment exchange as mandated under Rule 149 (2) of the Co-operative Societies Rules and thus their engagement / appointment is irregular / legal.

e. That the 2nd respondent was engaged only during festival seasons on daily wages and was never employed on permanent basis.

3. To the contrary it was submitted by the learned counsel for the respondents that the 2nd respondent has been working in the retail stores run by the appellant society for more than 17 years and the last spell was from 12.05.1999 to 31.05.2000 and further in any view, she had actually worked for more than 240 days, during the period 12.05.1999 to 31.05.2000 and she was paid at the rate of Rs.30/- per day.

4. It has been found by the Appellate Authority under Section 41 (2) of the Tamil Nadu Shops and Establishments Act, 1947 on the basis of evidence marked as Exhibits P.18 to P.28 that the 2nd respondent had been in continuous employment for year inasmuch as she has actually worked for 265 days during the said period. The above finding of fact has been found by the learned Single Judge as not suffering from any perversity and thus was of the view that it did not warrant interference.

5. The following issues arise for consideration viz.,

a. Whether there is merit in the contention of the appellant that any recruitment / appointment unless sponsored through employment exchange is illegal / irregular.

b. Whether the learned Single Judge erred in directing grant of permanent status to the 2nd respondent.

Insofar as the 1st question is concerned we find that the issue in no longer *res-integra*. The Apex Court, in a judgment in *Excise Superintendent case v. K.B.N.Visweswara Rao and others* reported in *1996 (6) SCC 216*, had held that recruiting employees by confining to sponsorship through employment exchange is not desirable which has been followed by this Court in W.A.No. 696 and 697 of 2012 dated 19.08.2014 in the case of *Government of Tamil Nadu v. Tamil Nadu Makkal Nala*

Paniyalargal Munnettra Sangam reported in *(2014) 4 LLJ 16* wherein it was held after referring to the judgment of the Hon'ble Supreme Court in the case of *Ghaziabad Development Authority v. Ashok Kumar* reported in (*2008) 4 SCC 261* that sponsorship through employment exchange may be a source but not the exclusive source. The following portions are relevant:

***Excise Supdt. v. K.B.N. Visweshwara Rao*, (1996) 6 SCC 216**

> ***"6.*** *Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."*

Government of Tamil Nadu v. Tamil Nadu Makkal Nala Paniyalargal Munnettra Sangam (2014) 4 LLJ 16

> *"23......The Government is selecting various persons in public employment by adopting the said mode through (i) Tamil Nadu Public Service Commission, (ii) Teachers Recruitment Board, (iii) Tamil Nadu Uniformed Services Recruitment Board (Police Recruitment), (iv) Tamil Nadu Medical Recruitment Board, etc. Those recruiting agencies are invitingapplications only through open advertisement for appointment in permanent posts and sponsorship through Employment Exchange is not resorted."*

Apparently, it is for this reason that there was an amendment to Rule 149 of the Co-operative Societies Rules, incorporating the words "not only Employment Exchange, but other methods as well".

6. In view of the above, we see no merit in the above contention of the appellant society, made in respect of the 1st issue.

7. Insofar as the 2nd issue is concerned, the Authority/ 1st Respondent herein had rendered a finding that the 1st Respondent had completed more than 240 days of continuous working with the appellant society during the period 12.05.1999 to 31.05.2000, which is a finding of fact rendered on the basis of evidence. Such finding cannot be disturbed as it does not suffer from any perversity. Thus, we see no reason whatsoever to interfere with the order of the learned Single Judge on this ground as well.

8. The next contention raised by the appellant that the authority under the Tamil Nadu Shops and Establishments Act, 1947 cannot issue direction / extend benefits under other labour enactments, such as the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act,1981, and issue a direction to confer permanent

status, also does not appear to have merit. It is further stated by the appellant that the 2nd respondent has not sought for permanent status before the authority and hence no relief could have been extended by the learned Single Judge and, therefore, to that extent, even assuming that the order terminating the service of the 2nd respondent / employee is bad, the order of the learned Single Judge, which is impugned herein, requires interference.

9. The above submission need not detain us for long, since we find that this Court in case of *T.N.Chandra V. South India Corporation (Agencies), Ltd., and another, (1992) 1 LLJ 739*, had held that the authority under the Tamil Nadu Shops and Establishments Act, 1947 can go into the issues under other labour enactments including Section 25-F of the Industrial Disputes Act. The relevant paragraphs of the said order is extracted below :

T.N.Chandra V. South India Corporation (Agencies), Ltd., and another, (1992) 1 LLJ 739

> *"8. We have carefully considered the respective submissions of the learned counsel appearing on either side but unable to subscribe to the views expressed by the learned Single Judge or uphold the order under appeal before us. In the decision in Mohan Lal v. Bharat Electronics, Ltd. [1981— II L.L.N. 23] (vide supra), the Supreme Court held that a termination in violation of S. 25 of the Industrial Disputes Act, would be ab initio void and the workman would be entitled to a declaration that he continues to be in service with all consequential benefits. In Krishna District Co-operative Marketing Society, Ltd., Vijayawada v. N.V. Purnachandra Rao [1987— II L.L.N. 671] (vide supra), the Supreme Court held that if the management is an "industry" as defined in the Industrial Disputes Act,*

and the action taken by the management amounts to "retrenchment" then the rights and liabilities of the parties are governed by the provisions of Chap. V-A of the Industrial Disputes Act and the said rights and liabilities may be adjudicated upon and enforced in proceedings before the Authorities under Ss. 40(1) and 40(3) of the Andhra Pradesh Shops and Establishments Act, 1966. In Safire Theatre v. Commissioner for Workmen's Compensation [1977 — II L. L N. 398] (vide supra), a Full Bench of this Court held that 3. 2-A of the Industrial Disputes Act does not fully bar the remedy under S. 41 of the Shops Act, and if a decision is rendered under S. 41(2) of the Shops Act before the Government had made a reference under S. 10 of the Industrial Disputes Act, that decision would be final between the parties and that the remedies under both the Acts, subject to certain conditions pointed out, are available to a worker. In State Bank of Travancore v. Deputy Commissioner of Labour [1981 — I L.L.N. 526] (vide supra), a learned Single Judge of this Court held that where the worker satisfied the definition of a person employed and the management satisfied the definition of an employer within the meaning of the Act, any contract between the employer and the person employed cannot override the express provisions of the Shops Act, particularly S. 41 thereof. The decision in Palaniswami v. Madukkarai Cement Works Employees [1975 — II L.L.N. 297] (vide supra), of a learned Single Judge of this Court was referred to in order to show that even in respect of a probationer, this Court considered the question of termination in the light of S. 41 though ultimately on merits the claim of the worker was rejected.

10. In the light of the above position of law, it could be seen that no doubt a worker, who is entitled to the benefits of Chap. V-A of the Industrial Disputes Act can have such rights adjudicated upon even in the proceedings before the Shops Act Authority, but before doing so, he must satisfy such entitlement to the benefits of the provisions contained in Chap. V-A of the Industrial Disputes Act in accordance with the provisions of the said Act. As opined by the Supreme Court, it should be first established that the appellant is a "workman" and the management an "industry" and the action taken constitutes "retrenchment" within the meaning of the Industrial Disputes Act. It also becomes necessary to establish that the appellant has been in "continuous service for not less than one year" and satisfies the terms of S. 25-B for that purpose. So far as the case on hand is concerned, no sufficient materials seem to have been produced and there is nothing on record before us in the shape of concrete materials to find out the existence of those essential requirements. Therefore, the claims could be considered, as has been done by the authority below, only with reference to the provisions of the Shops Act."

(emphasis supplied)

In this regard it may also be useful to refer to the following judgment:

***Syed Azam Hussaini v. Andhra Bank Ltd.*, 1995 Supp (1) SCC 557**

*"**12.** There is one more hurdle in the path of the respondent-Bank. It cannot be disputed that the appellant had completed 240 days of service since he had joined duty on 6-4-1970 and his services were terminated on 2-1-1971. The appellant was a 'workman' for the purpose of Section 2(s) of the Industrial Disputes Act, 1947 since he was employed in the clerical grade with the respondent-Bank which is an "industry" under Section 2(j) of the Industrial Disputes Act, 1947. The termination of appellant's services was, therefore, retrenchment under Section 2(oo) of the Industrial Disputes Act, 1947 and it could be done only in accordance with the provisions contained in Section 25-F of the Industrial Disputes Act, 1947. In Krishna District Coop. Marketing Society Ltd. v. N.V. Purnachandra Rao [(1987) 4 SCC 99 : 1987 SCC (L&S) 366] , this Court has construed the provisions of Chapter V-A of the Industrial Disputes Act, 1947 and Sections 40 and 41 of the Act and has held that if the employees are 'workmen' and the Management is an 'industry' as defined in the Industrial Disputes Act and the action taken by the Management amounts to 'retrenchment' then the rights and liabilities of the parties are governed by the provisions of Chapter V-A of the Industrial Disputes Act and the said rights and liabilities may be adjudicated upon and enforced in proceedings before the authorities under sub-sections (1) and (3) of Section 41 of the Act. In that case proceedings had been initiated in the form of appeal filed under Section 41 of the Act before the Authority and it was held that since the orders for termination of services of the employee amounted to retrenchment and had been passed without complying with Section 25-F of the Industrial Disputes Act, the order of the Authority setting aside the said orders of termination could be affirmed in view of Section 25-F of the Industrial Disputes Act. This Court further held that it is open to the Authority under Section 41 of the Act to determine whether Section 25-F and Section 25-G of the Industrial Disputes Act were complied with or not and to set aside the orders of termination and to grant appropriate relief if it is found that there was non-compliance with Sections 25-F and 25-G of the Industrial Disputes Act. Applying the said decision to the facts of the present case it can be said that since the appellant was a workman and the respondent-Bank is an industry under the Industrial Disputes Act the action taken by the respondent-Bank in terminating the services of the appellant amounts to 'retrenchment' and since the appellant had worked continuously for more than 240 days such retrenchment could be done only in accordance with provisions of Section 25-F of the Industrial Disputes Act, 1947. The said provisions were admittedly not complied with because one month's wages in lieu of notice were not paid at the time of such retrenchment on 2-1-1971 and were paid subsequently on 5-1-1971. The termination of the services of the appellant cannot, therefore, be upheld as legal and valid. "*

10. Having found that the finding of the authority under the Tamil Nadu Shops and Establishments Act, 1947 would be binding between the parties in respect of the remedy / benefit under other labour enactment. We would think that the consequence of affirming the order of the learned Single Judge whereby the order of the Appellate Authority holding the termination to be bad was upheld would result in the 2nd respondent being deemed to continue to be engaged / remained in service as if she had never been terminated. In this regard, it may be useful to refer to the following judgment of this Court in the case of *Tata Iron and Steel Co., Ltd. vs. G. Ramakrishna Ayyar and Ors*., *1950(LLJ) 1043Mad* :

> *"4. It is next contended by Mr. Ramakrishna Ayyar that in any event the order of the Commissioner was bad in so far as it directed a reinstatement in service of the first respondent. The argument was that there is no specific provision in the Act which enabled the authority to make an order of reinstatement. He referred us by way of analogy to the jurisdiction of Industrial Tribunals to make orders of reinstatement, but we think such reference is wholly irrelevant. To a certain extent we agree with the learned Counsel, namely, that the authority should not have said that the employee would be entitled to reinstatement. But this is only quarrelling with his language. Actually the legal position is this. The employer passes an order dispensing with the services of an employee. That order is carried on appeal to a higher authority. That authority reverses the decision of the employer and the result is that the order of the employer is set aside. It is no longer in existence. It follows that the effect of the original order of the employer also disappears and it is as if the order is nonsense .Though, therefore, it may not be quite accurate to say that the employee will entitled to reinstatement in service, yet the result of the order of the appellate authority is virtually the same. Probably, the result 6T the appellate order is even Better than an order of reinstatement. It is as if the employee had never been properly dismissed from service. In this view it is not necessary to quash the order of the appellate authority even in this respect."*

11. Once the order of the Appellate Authority is set aside as stated supra, the order of termination is non-est in the eye of law and the employee is deemed to be in service. It is open to the employer to divest the employee of the services but only after compliance of Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 or Section 25-F of the Industrial Dispute Act, 1947 or such other provisions as contemplated under the Industrial Disputes Act, 1947 or other labour enactment that may be appealable to the parties.

12. The Apex Court, in the case of *Harinandan Prasad and Anr. v. Employer I/R to Mangmt.of F.C.I. and Anr. (2014) 7 SCC 190*, has held that unlike Civil Court, Industrial Forum has powers to create a new contract.

***Hari Nandan Prasad v. Food Corporation of India*, (2014) 7 SCC 190**

> "*36. In the language of Krishna Iyer, J.:*
>
> *"22. The Industrial Disputes Act is a benign measure which seeks to pre-empt industrial tensions, provide the mechanics of dispute resolutions and set up the necessary infrastructure, so that the energies of the partners in production may not be dissipated in counterproductive battles and the assurance of industrial justice may create a climate of goodwill." [LIC v. D.J. Bahadur (1981) 1 SCC 315]*
>
> *In order to achieve the aforesaid objectives, the Labour Courts/Industrial Tribunals are given wide powers not only to enforce the rights but even to create new rights, with the underlying objective to achieve social justice. Way back in the year 1950 i.e. immediately after the enactment of the Industrial*

Disputes Act, in one of its first and celebrated judgment in Bharat Bank Ltd. v. Employees [1950 SCC 470]

"61. … In settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

37. At the same time, the aforesaid sweeping power conferred upon the Tribunal is not unbridled and is circumscribed by this Court in New Maneck Chowk Spg. & Wvg. Co. Ltd. v. Textile Labour Assn. [AIR 1961 SC 867] , in the following words:

"6. … This, however, does not mean that an Industrial Court can do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject-matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to that matter as laid down by the legislature or by this Court."

38. It is, thus, this fine balancing which is required to be achieved while adjudicating a particular dispute, keeping in mind that the industrial disputes are settled by industrial adjudication on principles of fair play and justice.

39. On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularisation only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularisation would be impermissible. In the aforesaid circumstances giving of direction to regularise such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the

> *worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules. However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularisation in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator would be achieving the equality by upholding Article 14, rather than violating this constitutional provision."*

13. We also find that the attempt by the respondents to submit that there needs to be an order for regularisation, overlooks the fact that Section 3 of the Permanent Status Act, mentioned supra, contains a deeming provision whereby the employee is deemed to be made permanent on completion of 480 days in 24 calendar months. The said Act deems that a person employed for more than 480 days in a period of 24 calendar months to be permanent. However, it is open to the employer to proceed against the employee for any misconduct, including any illegal entry by means of a false service certificate into the organisation. The issue before this Court is, whether the order of the Appellate Authority, which set aside the order of termination, and confirmed by the learned Single Judge and the consequence / impact of the same on the rights of the 2nd respondent under the labour enactments warrants interference.

14. From the foregoing discussions, we are of the view that the order of the learned Single Judge does not warrant interference as we do not find merit in any of the contention put forth by the appellant.

15. For all the above reasons, we find no reason to interfere with the order of the learned Single Judge. The Writ Appeal stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

[S.V.N., J.] [M.S.Q., J.]
23.06.2023

Index : Yes/No
Speaking / Non-speaking Order
Neutral Citation : Yes/No
shk/mka

To
The Deputy Commissioner of Labour,
Office of the Commissioner of Labour,
Chennai 600 006.

S.VAIDYANATHAN, J.
AND
MOHAMMED SHAFFIQ, J.

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Pre-delivery judgment in
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