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W.A. No. 3612 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2023

CORAM

THE HON'BLE MR.JUSTICE S. VAIDYANATHAN

AND

THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ

W.A. No. 3612 of 2019
&
C.M.P. No. 23180 of 2019

The Management of Metropolitan
Transport Corporation (Chennai) Ltd.,
Pallavan Illam, Anna Salai,
Chennai – 600 002.
rep. by its Deputy Manager

..Appellant

Vs.

1. The Special Deputy Commissioner of Labour,
DMS Compound, Chennai.

2. D. Kubendiran

..Respondents

Prayer: Writ Appeal as against the order passed in W.P. No. 1736 of 2014
dated 23.06.2017.

For Appellant :: Mr.R. Raman Lal
Additional Advocate General
assisted by Mr.Vinoth Raj



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For Respondents :: Mrs.C. Sangamithirai,
Special Govt. Pleader for R1
Mr.S.T. Varadarajulu for R2

J U D G M E N T

S. VAIDYANATHAN,J.

AND

MOHAMMED SHAFFIQ,J.

Challenging the order dated 23.06.2017 passed by the learned Single Judge in W.P. No. 1736 of 2014, whereby the order of Special Deputy Commissioner of Labour rejecting the approval petitions filed by the appellant Management was confirmed with a further direction to pay 25% of backwages to the employee, the present writ appeal has been preferred.

2. The 2nd respondent employee was dismissed from service by order dated 28.03.2008. As an industrial dispute was pending, the Management ought to have filed an approval petition seeking approval of their action in terms of Section 33(2)(b) of Industrial Disputes Act, 1947 ('the Act' in short) and the application should have been filed simultaneously by the Management. However, the approval application was filed before the



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authority after a delay of 3 years. In terms of Rule 64(2) of Tamil Nadu Industrial Dispute Rules, 1958, the application was not filed simultaneously and that there was a delay of nearly 3 years. The authority had rejected the application seeking approval of dismissal by order dated 22.07.2013. In view of the said order passed by the Special Deputy Commissioner of Labour under Section 33(2)(b) of the Act, the employee is deemed to be in service and entitled to benefits.

3. Questioning the said order, writ petition was filed and during the pendency of the writ petition, the employee was directed to be paid wages under Section 17B of the Act. Though a reading of Section 17B of the Act would make it very clear that the benefit under Section 17B would arise only in case of reinstatement by virtue of an award, an employee, who has the benefit of the order under Section 33(2)(b) is deemed to be in service from the date of removal from service by the employer as the order passed by the employer was held to be *non est* in the eye of law at the moment, the rejection order is passed by the Special Deputy Commissioner of Labour under Section 33(2)(b) of the Act. The employer had not



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questioned the interim order directing payment of wages under Section 17B of the Act as probably they would have felt that lesser amount had been granted than what had been sought by the employee. Once the employee is deemed to be in service, in view of the rejection of the approval petition, the employer will have to pay, not the last drawn wages, but the current wages on par with his counterparts.

4. When the writ petition was taken up for hearing, the employee had conceded for deduction of 50% of the backwages and agreed to accept the balance amount and also agreed to contribute his share towards Provident Fund. Learned Single Judge, while confirming the order passed by the 1st respondent -Special Deputy Commissioner of Labour, had himself modified the order into one of reinstatement with all benefits, but with 25% backwages apart from payment of contribution of the employer's share by the employee. Though it has been observed in the order that while challenging the dismissal order before the Industrial Tribunal, there is no automatic backwages, the same would be applicable if there is an award by the Labour Court in an industrial dispute. Once the order of approval is



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rejected by the authority under Section 33(2)(b) of the Act, the employee is deemed to be in service and entitled to all the monetary benefits as stated supra. However, in the present case on hand, as the employee had conceded for deduction of 50% of backwages, the learned Single Judge had granted the relief with 25% backwages and directed the employer to comply with the order within a period of eight weeks from the date of receipt of a copy of this order. Aggrieved by the said order, the present appeal has been preferred.

5. The primordial contention of the appellant Management is that the employee had been asked to report for work by communication dated 06.09.2019 and for more than 3 years, he had not reported for work. According to the appellant Management, he had approached the employer to receive wages under Section 17B of the Act to an extent of Rs. 1,72,635/- and the intention of the employee is to take the money and not to work. It had been stated in the order that the employee would be provided with job without backwages and without prejudice to their rights in the writ appeal.



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6. On the other hand, the 2nd respondent employee would contend that the order dated 06.09.2019 was not served on him and only when the matter was listed in November, 2022, it was informed to his counsel.

7. Heard both sides.

8. There is no iota of evidence produced by the employee to prove that he had made attempts periodically claiming reinstatement. He has not filed any petition before the Labour Court claiming wages under Section 33(c) of the Act. That being the case, the contention of the employee that he had not received the communication dated 06.09.2019 cannot be accepted.

9. After the matter was heard at length and when it was taken up for further hearing, the employee has filed an affidavit dated 10.01.2023 stating that he is willing to give up backwages from 06.09.2019, the date on which the communication is said to have been served on him till the date of his re-appointment. However, the learned counsel for the 2nd respondent would state that employee shall be provided with continuity of service and



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other attendant benefits. It is also stated in paragraph No.7 of the affidavit that he may be given a month's time to report for work as he is taking treatment at Omanthurar Government Hospital.

10. Mr.R. Raman Lal, learned Additional Advocate General appearing for the Management would submit that in case of reinstatement, the employer will be unnecessarily forced to pay the employer's contribution without extracting any work and the employee, in the affidavit filed, has agreed that he would not claim wages only from 06.09.2019 and not prior to that. Learned Additional Advocate General would further submit that if a specific order is given with regard to payment of Provident Fund contribution by the employee, as agreed by him, the employer may not have any objection and in case of any difference in the amount payable by the employee, he will have to remit the contribution.

11. Taking note of the above submission, while confirming the order of the learned Single Judge, we make it very clear that the employee will not be entitled to wages from 06.09.2019 till he reports for work. Even



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during the course of hearing, we had made it very clear that the employee would not be entitled to wages from 06.09.2019 as he did not report for work. He is entitled to wages as per the order of the learned Single Judge prior to the date of the order dated 06.09.2019. ***Since the 2nd respondent employee has agreed to report for work within a month from today, he is expected to report for work on or before 15.02.2023.*** In case, the employee fails to report for work, it is open to the employer to take action for his absence from 06.09.2019 till he reports for work. We also make it very clear since the approval authority has set aside the dismissal order, the employee is deemed to be in service and he would be entitled to continuity of service and other attendant benefits as if there is no order of dismissal in the eye of law. However, he is not entitled to wages from 06.09.2019 till the date on which he reports for work. Besides, from 06.09.2019 till the employee reports for work, there is no need for the employer to pay the employer's contribution towards Provident Fund. The payment of contribution towards EPF will arise only if the employee works and receives remuneration. In the present case on hand, from 06.09.2019, the employee has not reported for work and hence, there cannot be any employer or employee contribution



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towards Provident Fund from 06.09.2019 till the employee reports for work.

In case of any difference in amount with regard to backwages payable to the employee, after adjusting the wages under Section 17B of the Act, the same shall be paid within a period of two months from the date of receipt of a copy of this order. In case, the employee had received excess amount, he shall remit his share of the EPF contribution to the Provident Fund Trust.

12. The writ appeal is disposed of with the above directions. No costs. Connected C.M.P. Is closed.

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(S.V.N.J.) (M.S.Q.J.)
10.01.2023

S. VAIDYANATHAN,J.



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AND

MOHAMMED SHAFFIQ,J.

nv

To

The Deputy Manager,
The Management of Metropolitan
Transport Corporation (Chennai) Ltd.,
Pallavan Illam, Anna Salai,
Chennai – 600 002.

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