



W.P.(MD) No.3702 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.02.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.(MD)No.3702 of 2020

and

W.M.P(MD)No.3117 of 2020

The Senior Regional Manager,
Tamilnadu Civil Supplies Corporation,
Trichy Region,
Court Complex,
Cantonment,
Trichy – 01.

... Petitioner

-VS-

1.The Joint Commissioner of Labour,
(Appellate Authority Under
the Payment of Gratuity Act),
Office of the Joint Commissioner of Labour,
Trichy.

2.The Assistant Commissioner of Labour,
(Controlling Authority Under
the Payment of Gratuity Act),
Office of Assistant
Commissioner of Labour,
Trichy.

3.V.Balu

... Respondents



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Prayer:- Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records pertaining to the impugned order passed by the 1st respondent in P.G.A.No.05 of 2019 dated 21.10.2019 and quash the same.

For Petitioner : Mr.G.Mohankumar
For Respondents : Mrs.K.Christy Theboral for R1 & R2
Additional Government Pleader
Mr.S.Arunachalam for R3

ORDER

This writ petition has been filed to quash the impugned order passed by the 1st respondent in P.G.A.No.05 of 2019, dated 21.10.2019.

2. The case of the petitioner Tamil Nadu Civil Supplies Corporation is that the third respondent/employee was appointed as a temporary employee in Direct Procurement Centre and he has not put in qualifying service. On attaining the age of superannuation, the gratuity amount was paid to him by calculating the service rendered by him. However, he filed a petition in P.G.No.20 of 2017 before the second respondent seeking gratuity. The Original Authority dismissed the said petition on the ground that the third respondent failed to establish his continuous service from 01.10.1984. Challenging the same, the third



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respondent filed an appeal in P.G.A.No.5 of 2019 before the first respondent. The said appeal was allowed by the first respondent on erroneous consideration on 21.10.2019. Challenging the same, the present writ petition has been filed.

3. The learned counsel for the petitioner would submit that the private respondent was only engaged as a temporary seasonal employee on consolidated pay in the Tamil Nadu Civil Supplies Corporation. He would further submit that his employment is seasonal one and that, there was no continuity of service from 1984. Subsequently, the employee was appointed in time scale of pay in different cadres and he has retired on attaining the age of superannuation. Since he has not completed 240 days continuous qualifying service in a calender year, he is not entitled for gratuity and the gratuity petition filed by him is not maintainable.

4. The learned counsel for the petitioner would further submit that as per Section 2A of the Industrial Disputes Act, where an employee employed in a seasonal establishment is not in continuous service within the meaning of clause (1) for any period of one year or six months, he



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shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than 75% of the number of days on which the establishment was in operation during such period. In the present case, when the third respondent rendered service only for the seasonal period, the original authority has rightly rejected the application of the third respondent seeking for gratuity. However, the first respondent/appellate authority has allowed the case of the third respondent, which is non-est in the eye of law and accordingly, prays for allowing of the writ petition.

5. Per contra, the learned counsel for the third respondent would submit that the issue arises in the writ petition is no longer *res integra*, which has been decided by this Court, in W.P.Nos.16007 to 16011 of 2013 and this Court dismissed the writ petitions on 30.09.2013 and held in favour of the employees, which went on appeal and the order of the learned single Judge was confirmed by this Court in WA.Nos.353 to 357 of 2014 vide judgment, dated 12.03.2018. In view of the law down by the Division Bench of this Court, this writ petition is liable to be dismissed and hence, prayed for dismissal of this writ petition.



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6. Heard the learned counsel for the petitioner, the learned Additional Government Pleader appearing for the respondents 1 and 2 and the learned counsel appearing for the third respondent.

7. The fact in the present case with regard to the appointment of the third respondent is not in dispute. The third respondent filed a claim petition before the original authority under the Payment of Gratuity Act for payment of gratuity for the entire period, they worked under the petitioner management. The original authority dismissed the petition. However, the appellate authority has held in favour of the third respondent, which is not sustainable one as the issue raised in this writ petition is no longer *res integra* in view of the decision rendered by this Court in W.P.Nos.16007 to 16011 of 2013, dated 30.09.2013 and the relevant portion of the order is extracted hereunder:

“9.The second proviso to Sub-Section (2) of Section 4 of the Payment of Gratuity Act, 1972, upon which much reliance has been placed by the petitioner, speaks of establishment which is seasonal in character. It deals with an employee who is working in a seasonal establishment. Thus, it is crystal clear that the establishment itself should be a seasonal one. In the said Act, however, the term



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“establishment” has not been defined. Taking the meaning of the term “establishment” from other labour legislations, I have to state that the entire Tamil Nadu Civil Supplies Corporation is an establishment. In other words, the term “employer” refers to the Tamil Nadu Civil Supplies Corporation, and therefore, it is an establishment. It is not as though the employees were employed by the Direct Purchase Centres. They are all Centres run by the Tamil Nadu Civil Supplies Corporation, and the employees were employed not by Direct Purchase Centres but by the Tamil Nadu Civil Supplies Corporation itself. Therefore, the Tamil Nadu Civil Supplies Corporation, as a single unit, is an establishment which undoubtedly, is not a seasonal establishment. The proviso to Sub-Section (2) of Section 4 does not refer to seasonal employment of an employee. A plain reading of the said proviso goes to show that it refers only to seasonal establishment. Therefore, it is not the character of employee but it is the character of the establishment itself, which is relevant. Here, in this case, the character of the establishment is not seasonal, and therefore, the said proviso is not applicable to Tamil Nadu Civil Supplies Corporation.

10.The learned counsel for the petitioner would contend that apart from the above clause, viz. seasonal establishment, there is also another requirement in the said Proviso which states that “and who is not so employed



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throughout the year”. Referring to this, the learned counsel for the petitioner would contend that employees were not admittedly employed throughout the year and thus according to the learned counsel, the employees would fall within this phrase and thus the proviso is applicable. This argument, though attractive, does not persuade me for many reasons.

11.First of all, if one carefully looks into the Proviso, it is crystal clear that it is not stated as though an employee who is employed in a seasonal establishment OR who is not so employed throughout the year. The word used between the two clauses is a conjunction, viz. “and”. The word used is not “or” which is disjunctive in nature. If the word “or” has been used, then, irrespective of the fact whether the establishment is seasonal or permanent, if the employee has not worked throughout the year, he will be entitled only for gratuity at the rate of 7 days for each season as the Proviso would be applicable. Obviously, the Legislature did not use the disjunction “or”. Instead, the Legislature has consciously used the word “and”. Thus it is the intention of the Legislature to bring those employees who are the employees of an establishment which is seasonal and further those employees who have not worked throughout the year, within the ambit of this Proviso. Here in this case, the establishment cannot be stated to be seasonal, even though it may be the case that employees did not work throughout the year. In



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such view of the matter, I hold that the second Proviso to Sub-Section (2) of Section 4 of the Act, is not at all applicable to the employees of Tamil Nadu Civil Supplies Corporation, who have worked in the Direct Purchase Centres.

12. But the learned counsel for the petitioner-Corporation would make much reliance on the judgment of the Division Bench of this Court in Tamil Nadu Civil Supplies Corporation Workers Union v. Tamil Nadu Civil Supplies Corporation, cited supra. That was a case where the Trade Union filed the writ petition seeking the relief of permanent status for the employees of the Tamil Nadu Civil Supplies Corporation as per the provisions of the Tamil Nadu Industrial Establishment (Conferment of Permanent Status to Workmen) Act, 1981. The Division Bench referred to the relevant provision of the said Act, viz. Sub-Section (3) of Section 1, which reads as follows: “It applies to every Industrial Establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than 50 workmen were employed on any day of the preceding twelve months. If any question arises whether an Industrial establishment is of a seasonal character or whether work is performed therein only intermittently the decision of the Government thereon shall be final. (Emphasis supplied) Provided that the Government



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may, by notification, apply the provisions of this Act to any Industrial Establishment employing such number of workmen less than fifty as may be specified in the Notification.”

13. Referring to the said provision, the Division Bench took the view that the Bill Clerks, Helpers and Watchmen who are employees only on seasonal basis, are not entitled for the benefit of the said Act. In this context, we should note that the word used is not conjunctive “and”, instead the word used is disjunctive “or”. So far as this Act is concerned, if the establishment is seasonal in character, any employee who is employed in the said establishment is not entitled for the benefit of the Act. Though the establishment may not be a seasonal establishment, still if the work is performed intermittently, in such a case also, the employee is not entitled for any permanent status. That is the reason why the Legislature consciously used the word “or” between two phrases. As I have already pointed out, in the Payment of Gratuity Act, 1972, the word used is not “or”, but instead, “and” is used. Therefore, I hold that the said decision cannot be a precedent for deciding the issue involved in these writ petitions, as the two provisions referred to above are drastically different.

14. In view of all the above, I hold that the respondents



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1 and 2 were right in holding that employees are entitled for gratuity at the rate of 15% based on the rate of wages last drawn by the employee concerned as per the second Proviso to Sub-Section (2) of Section 4 of the Payment of Gratuity Act, 1972. I also hold that the second Proviso to Sub-Section (2) of Section 4 of the Payment of Gratuity Act, 1972 is not at all applicable to the employees of Tamil Nadu Civil Supplies Corporation who have worked in Direct Purchase Centres.”

8. The said order was challenged before this Court in W.A Nos.352 to 357/2014, wherein, it is held as follows:

“3.The legal issue involved in these writ petitions is squarely covered by the decision of this Court in W.P.No.4371 of 1998, dated 30.07.2008, which was confirmed by the Hon'ble Division Bench in W.A.No. 1282 of 2008, dated 19.07.2010. The operative portion of the order, dated 30.07.2008, passed in W.P.No.4371 of 1998, reads as follows:

“15.But in the present case, all the workers covered by the impugned order were all Assistant Quality Inspectors, Watchmen, Packer, Helper, Bill Clerk, etc. The procurement, storage and distribution are all on going process and if they



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are really seasonal, there is no question of the workmen being covered by the settlement or the Award as referred to by the Management. On the contrary, in the present case, even as per the admission of the learned counsel for the Management, who has given a tabular statement showing that the number of the workmen taken against the regular vacancy was 70.

16.Further, in the letter dated 02.4.1991 sent by the Chairman cum Managing Director of the petitioner Management to the Joint Commissioner of Labour over which a reference was made in the impugned order. The Managing Director had written in page 3 as follows:-

"Regarding payment of retaining allowance to the D.P.C. staff, this cannot be compared to the seasonal industries like sugar industry. This is not a seasonal industry and the Government have not declared it so. We need not retain them when there is no procurement and as such no retaining allowance need be paid."

Even as per the provisions of Permanent Status Act, if the petitioner wants, they can move the Government to declare the DPC as seasonal and they have not done so.

17.The argument that the settlement and the Award is binding cannot be accepted because of the non-obstante clause found in Section 3(1) of the I.D. Act. Originally, it did not cover a Settlement or an Award. Therefore, if there was any



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settlement or Award between the employer and the workmen, then the provisions of Tamil Nadu Act 46 of 1981 will have no application. This was noticed by a Division Bench of this Court in its judgment in Metal Powder Co. Ltd., Thirumangalam and another v. The State of Tamil Nadu and another [1985 (2) L.L.J. 376] and after referring to the similar provisions in other Labour enactments in paragraph 27, it was observed as follows:-

Para 27: "... We are bound to take notice of the legislative practice that where the intention of the legislature is that a law is to have effect notwithstanding any award, agreement or contract of service, such an intention is expressed in clear and unambiguous words. Consequently, in the absence of reference to an award, an agreement or a contract of service in S.3(1) and restricting the operation of the non-obstante clause in S.3(1) only to "anything contained in any law for the time being in force", we must accept the contention of the learned counsel for the petitioner that S.3 will not supersede a settlement between the employer and the employees in so far as the subject matter of the settlement is conferment of permanent status to the workmen...."

Taking note of the above judgment, the State Legislature amended Section 3(1) of the Tamil Nadu Act 46 of 1981 and the words 'settlement' and 'Award' have been included in the Explanation to Section 3(1) of the Act.

18. In fact, when the amended provisions were challenged before the Supreme Court, the Act was held to be



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intravires of the Constitution by the Supreme Court in State of Tamil Nadu and others v. Nellai Cotton Mills Ltd. and others [1990 (2) SCC 518]. Therefore, the objections based on the Award and settlement by the learned counsel for the Management must necessarily fail.

19. Thereafter, Mr. Ajay Khose, learned counsel appearing for the workmen brought to the notice of this Court a judgment of this Court in Tamil Nadu Civil Supplies Corporation Modern Rice Mill Engineering Section employees Union v. The Tamil Nadu Civil Supplies Corporation, rep. by its Managing Director [1998 Writ L.R. 514] relating to the very same Corporation. In that case, the petitioner Corporation gave a circular regularising the casual workers working in the Modern Rice Mill and gave their own date of regularisation. P.D. Dinakaran, J., in paragraphs 11 and 15 of the said judgment, held as follows:-

Para 11: "Section 3(1), being a non-obstante provision, it prevails over any law for the time being in force which includes any service rules, Government Orders or government instructions. Therefore, want of sanctioned posts as required under General service rules cannot take away the rights conferred under Section 3(1) of the Act. Similarly, Government Orders which require that the appointments should be made only through Employment Exchange also cannot be a ground to refuse the right provided under section 3(1) of the to the petitioners if they comply the requirements prescribed under Section 3(1). Therefore, it is not open for the respondent to take shelter under any



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other law in force much less any Government Orders, Government Instructions to deny the benefits conferred under Section 3(1) of the Act, to the petitioners, if they satisfy the conditions prescribed therein, irrespective of the availability of sanctioned posts or sponsorship from Employment Exchange."

Para 15: "Therefore, the respondents are directed to modify the proceedings dated 24.2.1989 to confer the permanent status to individual workmen from the day on which they satisfy the condition namely completing the continuous service for period of 480 days in a period of 24 Calendar months in the respondent establishment. The respondent shall pass appropriate orders as directed above within 6 weeks from the date of receipt of a copy of this order."

20. In the light of the above, the contentions raised by the petitioner Management will have to be necessarily rejected. In fact, the petitioner Management themselves have regularised the workmen on a posterior date. In the light of the above judgments of this Court and the Supreme Court, such action cannot be countenanced by this Court. The impugned order of the first respondent will have to be necessarily upheld. Accordingly, the writ petition will stand dismissed. However, there will be no order as to costs".

4. In the light of the above, the issue is squarely covered



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by the above referred decisions and therefore, the writ appeals fail and accordingly, the same are dismissed, confirming the common order, dated 30.09.2013, made in W.P(MD)Nos. 16007 to 16011 of 2013. No costs. Consequently, connected Miscellaneous Petitions are dismissed.”

9. In view of the categorical finding rendered by the learned single Judge as well as the Division Bench, the relief sought for by the petitioner in this writ petition cannot be granted. Accordingly, this writ petition is dismissed. No costs. Consequently connected Miscellaneous Petition is closed.

13.02.2023

NCC : Yes/No

Index : Yes/No

PM



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To

1.The Joint Commissioner of Labour,
(Appellate Authority Under
the Payment of Gratuity Act),
Office of the Joint Commissioner of Labour,
Trichy.

2.The Assistant Commissioner of Labour,
(Controlling Authority Under
the Payment of Gratuity Act),
Office of Assistant
Commissioner of Labour,
Trichy.



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M.DHANDAPANI, J.

pm

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