IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 31.08.2006

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Writ Petition No.1347 of 1998

The Management of
Tamil Nadu State Transport
Corporation (Coimbatore Division-I)Ltd.,
Formerly known as
Ceran Transport Corporation Ltd.,
Rep.by its Managing Director,
Coimbatore. ... Petitioner

Vs.

1. The Presiding Officer,
Labour Court, Coimbatore 18.

2. K.Karunakaran
NCL No.23639
C/o General Secretary
Plantation Workers Association (HMS)
Valparai,
Coimbatore 642 127. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India for the issuance of a writ of Certiorari, calling for the records pertaining to the first respondent made in I.D.No.72 of 1992 dated 26.06.1996 and quash the same.

For Petitioner : Mr.V.R.Kamalanathan, G.A.

For Respondents : Mr.K.V.Shanmuga Nathan

O R D E R

This writ petition is filed by the Management of the Tamil Nadu State Transport Corporation, Coimbatore (Division-I) Ltd., challenging the award of the Labour court passed in I.D.No.72 of 1992 dated 26.06.1996.

2. The second respondent while working as a casual Driver under the petitioner Corporation has caused serious accident on 17.08.1986, while driving the bus in a rash and negligent manner endangering the public safety. That was the case where the bus driven by the second respondent while crossing Coimbatore-Trichy Highways collided with a tourist van causing injuries to the passengers and also causing damages to the vehicle.

3. After finding that it was by the rash and negligent driving and considering that the second respondent has only worked for seven months in the petitioner Corporation, the second respondent was terminated on the ground of unsatisfactory performance. The termination of the second respondent was on 3.10.1986. However, the second respondent has raised the Industrial Dispute on 17.12.1991 after nearly more than five years. The Labour Court while allowing the said Industrial Dispute in I.D.No.72 of 1992 filed by the second respondent passed an award of reinstatement of the second respondent with backwages.

4. Challenging the said award, the petitioner Management has filed the present writ petition on the ground that the second respondent was stopped from service from 22.08.1986, even though the order of termination was passed on 03.10.1986. The petitioner's original appointment was on 14.01.1986. From the said date onwards till the stoppage of work on 22.08.1986, the petitioner has not completed 240 days and this aspect has not been considered by the Labour Court. The award is assailed on the ground that the Labour Court has presumed that the second respondent was deemed to have been in service from 22.08.1986 till the date of termination order dated 03.10.1986, in which case, the second respondent would have completed 240 days of service and therefore, he is entitled for reinstatement. The award is also assailed on the ground that the Labour Court is not correct to come to the conclusion in favour of the second respondent on the basis that the Motor Vehicle Inspector has not filed the report about the defects of the vehicles and therefore, it is not correct for the Labour Court to arrive at an adverse inference that the vehicle has no defect.

5. Even though the second respondent has not filed counter affidavit, the learned counsel appearing for the second respondent has advanced his arguments. I have heard Mr.V.R.Kamalnathan, learned counsel for the petitioner Management and also Mr.Shanmuga Sundaram learned counsel appearing for the second respondent.

6. Mr. V.R.Kamalnathan, learned counsel appearing for the petitioner Management would submit that even though the termination order was passed under Ex.M.10 on 03.10.1986, it has been given effect to from 22.08.1986. Therefore, from 14.01.1986 the date of

the second respondent joined duty till 22.08.1986, the second respondent has not completed 240 days of service and therefore, the presumption by the Labour Court that the second respondent is deemed to have continued in service beyond 22.08.1986 till the date of Ex.M.10 namely 3.10.1986 and therefore, the second respondent is deemed to have completed 240 days service is only based on surmises. According to him, the burden is on the workman to prove that in fact he has worked for 240 days to have benefit under Section 25F of the Industrial Disputes Act, 1947.

7. The learned counsel would rely upon the judgment rendered in N.S.Ravichandran Vs. Management of Thanthai Periyar Transport Corporation and others reported in 2003(1) L.L.N. page 415. That was a case wherein while considering about the protection of the employees under Section 25F of the Industrial Disputes Act, 1947, this Court by relying upon various judgments of the Apex Court has held that it was for the claimant to adduce evidence to show that he had in fact worked for 240 days in the year preceding his termination.

8. Therefore, according to the learned counsel for the petitioner, inasmuch as there was no proof that, the second respondent has not worked for 240 days, it cannot be said that the second respondent is entitled for the protection under Section 25F the Industrial Disputes Act.

9. Learned counsel also would rely upon the judgment of the Honble Apex Court rendered in Essen Deinki Vs. Rajiv Kumar reported in 2002(4) L.L.N. page No.1176, wherein the Apex Court by dealing with Section 25F of the Industrial Disputes Act has held that it is the duty of the employee to prove that he has worked for 240 days and in that case when the employee himself has admitted that he has not worked for 240 days, the Apex Court has set aside the order of the High Court holding that the employee is not entitled for the benefits under Section 25F of the Industrial Disputes Act.

10. The learned counsel also would state that there is enormous delay of more than 5 years on the part of the second respondent in approaching the Labour Court and the Labour Court has not considered the same.

11. On the other hand, the learned counsel for the second respondent would contend that even though this petition is filed under Section 2A of the Industrial Disputes Act by raising Industrial Dispute, the second respondent has prayed before the Labour Court for setting aside the order of termination dated 22.08.1986. The fact remains as it is proved by the document on the side of the Management under Ex.M.10 that in fact the order of termination was passed by the Management-writ petitioner only on

03.10.1986 and therefore, the statement made by the second respondent in the claim petition that he has been terminated from 22.08.1986 need not be taken serious note of.

12. The learned counsel also would submit that the delay alone cannot be the ground for the purpose of refusing to interfere in the cases where the claim of the employee is genuine. He would also rely upon the judgment of the Apex court in Ajaib Singh Vs. Sirhind Co-operative Marketing-cum-Processing Service Society, Ltd., and another reported in 1999(2) L.L.N. page No.674 to show that in such cases of delay, the court can mould relief by refusing backwages or in appropriate cases, direct payment of backwages instead of full backwages.

13. I have considered the rival submissions of the counsel for the petitioner as well as the second respondent and also perused the records.

14. At the outset, it is relevant to point out the case of the second respondent who is the petitioner in I.D.No.72 of 1992. In the claim petition filed by the second respondent, he has clearly come out with a positive case that he has not worked beyond 22.08.1986. In fact, a reference to the prayer in the claim petition also shows that what the second respondent/workman wanted was to set aside the order of the termination passed by the petitioner herein dated 22.08.1986 and to reinstate him with all backwages.

15. It is also the case of the writ petitioner herein who is respondent in I.D. that the order of termination was passed against the second respondent/workman by the writ petitioner's order dated 3.10.1986 was with effect from 22.08.1986, and till 22.08.1986 the petitioner has not completed 240 days of continuous service.

16. It is also relevant to point out that in the Labour Court, Chennai, neither the workman nor the employer has adduced evidence even though various documents were filed. The Labour Court has found that as seen in Ex.M.6, the employer put of duty against the workman from 22.08.1986. Thereafter charges were framed and showcause notice was issued as seen in Ex.M.9 and ultimately, as per Ex.M.10 dated 3.10.1986, the workman/second respondent herein was terminated from service from 22.08.1986. If the second respondent has not been employed after 22.08.1986, it is admitted case that from the date of original appointment till 22.08.1986 he would not have worked for 240 days. While admittedly, the second respondent has not in fact worked between 22.08.1986 and 03.10.1986, the Labour Court has considered that the termination should be treated as come into effect only from 03.10.1986. Therefore, it should be presumed that the second respondent has worked till 03.10.1986 and it was on

that presumption by coming to a conclusion that the second respondent would have worked for 240 days, if the last date of his employment is taken as 03.10.1986, has passed the award in favour of the second respondent for reinstatement with backwages, by holding that the termination of the second respondent is not valid.

17. The Labour Court has further held that due to the said reason that the second respondent is deemed to have actually worked for more than 240 days, he should not be treated as a temporary employee and due opportunity should have been given and in the present case, after the showcause notice was given under Ex.M.9 on 16.09.1986, without even obtaining the explanation from the second respondent, the final order of termination was passed under Ex.M.10 on 03.10.1986 and therefore, the enquiry was not proper and set aside the order of termination.

18. The Labour Court has also further held that as far as the filing of the case before the Labour Court after more than 5 years delay the same has been properly explained. Now the question remains to be considered is as to whether the second respondent has actually proved that he has worked for 240 days continuously for the period of one year preceding the date on which he was terminated.

19. The term continuous service has been defined under Section 25B of the Industrial Disputes Act which runs as follows:

> "Definition of continuous service. - For the purposes of this Chapter,-
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, he actually worked under the employer for not less than -
>
> (i) one hundred and ninety days, in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months, preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.- For the purpose of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which -

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages earned in the previous yers;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks."

20. Therefore, for the purpose of claiming a right by a workman either under Section 25F of the Industrial Disputes Act or otherwise, the point that has to be proved by workman is that in a period of preceding 12 calendar months he has actually worked under the employer for not less than 240 days. It is only when such a proof is placed be the employee before the Labour court, that there can be presumption that the employee is under the continuous service for a period of one year in the preceding calendar year.

21. In the present case, as I have elicited earlier even as per the pleadings of the second respondent by way of claim statement, it is the specific case that the order of the employer/writ petitioner removing him on 22.08.1986 is to be set aside.

22. In such circumstances, I am of the considered view that as found by the Labour Court, there can not be presumption that the second respondent has worked under the petitioner management from 22.08.1986 to 03.10.1986. The term used under Section 25F of the Industrial Disputes Act read with Section 25B is that the employee has actually worked under the employer (the emphasis is mine). Therefore, when once it is admitted even by the second respondent he has not worked under the employer from 22.08.1986 till 03.10.1986,

there can be absolutely no presumption that the employee has actually worked under the employer. Any other construction apart from this will only thwart the very purpose of the definition of "continuous service" under the Industrial Disputes Act.

23. The legal position is that it is for the employee to prove that he has worked continuously for 240 days in the preceding year, has been well established by the Judicial pronouncements especially of our Hon'ble Apex Court. In fact, it was in the judgment of the Hon'ble Supreme Court in Range Forest Officer Vs. S.T.Hadimani reported in 2002(2) L.L.N. Page 397, the Hon'ble Supreme court had laid down the law in this regard that the onus of proof that the employee having worked continuously for 240 days is on the workman. The said judgment is in the following terms:

> "In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside".

24. Following the said the judgment, the Hon'ble Supreme Court in a subsequent judgment in M/s.Essen Deinki Vs. Rajivkumar reported in 2002(4) L.L.N. 1176 has rejected the case of the workman under Section 25F of the Industrial Disputes Act, in the admitted position by the workman that he has not worked for 240 days, while referring to the judgment reported in 1985(2) L.L.N. Page No.817, Workmen of American Express International Banking Corporation Vs. American Express International Banking Corporation, wherein the Honble Supreme Court has held in categoric wordings, while interpreting the term

> "actually worked under the employer used in Section 25B of the Industrial Disputes Act to state that the said expression cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was employment

of the employer for which has been paid wages either under express for implied contract service or by compulsion of statute, Standing Order etc."

25. In the present case, inasmuch as it is the admitted case of the 2nd respondent himself in the claim petition and he himself has come forward to the Labour Court to declare his termination dated 22.08.1986 as null and void and also for a consequential reinstatement, there is nothing to imply that the second respondent should have deemed to be in service till 03.10.1986 either by implied contract of service or compulsion of statute or otherwise.

26. The burden of proof in respect of the continuous service based on the above said judgment of the Hon'ble Apex Court has been followed by this court in various judgments including the one in N.S.Ravichandran Vs. Management of Thanthai Periyar Transport Corporation and others reported in 2003(1) L.L.N. page No.415, while dealing with Section 25F of the Industrial Disputes Act as follows:

"When an employee claims protection under S.25F of the Act by pleading that he had worked for 240 days, the burden is clearly on the workman, and unless he discharged the burden, he cannot expect to have his case for protection under S.25F of the Act accepted. Merely asserting the claim does not shift the burden to the management. It may be that in cases where all the circumstances indicate that the person had worked and the records are entirely with the employer, the Court may as has been held in the case of H.D.Singh(1985(2) L.L.N. 1037), draw the inference that the person had worked. But a mere assertion by itself is far from sufficient to cast the burden on the employer."

27. However, in the present case, as I have stated earlier, the pleading of the employee himself is that he has not worked for 240 days and in such circumstances, the inference drawn by the Labour Court is that if the second respondent would have worked for the period from 22.08.1986 to 03.10.1986, namely the date on which, the petitioner has passed an order of termination is only based on inferences and not based on the actual positions of the work rendered by the second respondent/employee either by receiving remuneration for the said period, etc.

28. In view of the said factual position, I am of the considered view that the conclusion arrived at by the Labour Court as if the second respondent is deemed to have been if continuous service for 240 days in the preceding 12 months has no legal basis whatsoever. As far as the other contention that in cases where that the delay is on the part of the workman in approaching the Labour Court, the backwages can be reduced as per the judgment of the

Hon'ble Apex Court in Ajaib Singh Vs. Sirhind Co-operative Marketing cum processing service society, Ltd., and another reported in 1999 (2) L.L.N.674 to the effect that the court can mould relief by refusing backwages in cases were there is a delay on the part of the employee in approaching the Labour Court, there is absolutely no dispute about the same. However, the conclusion arrived at in this case for the reasons stated earlier is that the second respondent has not proved that he has in fact worked under the employer for a continuous period of 240 days in the proceeding one year.

29. In view of the same the impugned award of the Labour Court dated 26.06.1996 passed in I.D.No.72 of 1992 is set aside and the writ petition stands allowed. No Costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Presiding Officer,
Labour Court,
Coimbatore 18.

+ 1 cc to Mr. K. V. Shanmuganathan, Advocate SR No. 39727

RA(CO)
SR/6.9.2006

Pre-delivery order
W.P.No.1347 of 1998