IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 27-06-2007

CORAM

THE HONOURABLE MR.JUSTICE DHARMA RAO ELIPE

AND

THE HONOURABLE MR.JUSTICE S.PALANIVELU

WRIT APPEAL No.1569 OF 2002

C.Vijayakumaran ... Appellant/2nd Respondent in WP.No. 12174/94.

-vs-

1.The Tamilnadu State Transport Corporation
(Madurai Division-III),
rep.by its Managing Director,
Ranithottam,
Nagercoil,
Kanyakumari District. ... Ist respondent/Petitioner in WP.No. 12174/94.

2.The Presiding Officer,
Labour Court,
Tirunelveli. ... 2nd Respondents/Ist Respondent in 12174/94

Appeal against the order, dated 12.02.2002, made in W.P.No.12174 of 1994 on the file of this Court Writ of Certiorari to call for the records in ID.No. 552/1989 from the Ist respondent and quash teh aaward dated 9.6.1993 passed by the firs respondent in the said ID.No. 552/1989.

For appellant : Mr.N.Edwin Jeyakumar
For respondent 1 : Mr.V.R.Kamalanathan

J U D G M E N T

S.PALANIVELU,J.

This Writ Appeal is directed against the order of a learned single Judge of this Court, dated 12.02.2002, made in W.P.No.12174 of

1994, whereby the award of the Labour Court, directing reinstatement of the appellant with back wages, was set aside.

2. The factual background, leading to the filing of this Writ Appeal, is recounted as under :

2.1. On 18.11.1987, the appellant/workman was appointed as a Security Guard in the respondent Corporation at Thoduvetty (Marthandam) New Depot, Kanyakumari District.

2.2. On 23.11.1987, there was a theft of cement, allegedly by one Selvaraj, Junior Engineer, one Muthiyan, permanent Security Guard, and the Contractor, who had undertaken the construction of new depot work.

2.3. The matter was reported by the appellant to the higher-ups and, thereafter, an inquiry was conducted, in which the appellant deposed about the facts of theft. The said proceedings culminated in removal of the said Junior Engineer and the permanent Security Guard from service.

2.4. On 29.11.1987, the appellant was transferred from Marthandam New Depot to Mondaymarket New Depot. He was drawing Rs.17.50 ps. per day and, after four months, his wages were increased to Rs.18.50 ps. per day. During the period of his service, no adverse remarks were noted or recorded by the management against him. He worked in the above said two depots from 18.11.1987 to 15.12.1988, without any break.

2.5. When the appellant went to attend duty in the Mondaymarket New Depot at 08.00 a.m. on 16.12.1988, he was not allowed by his superiors to sign in the attendance register. Thereafter, when he approached the superior officers for joining duty, they continuously refused to permit him to join duty. Though a registered letter was sent by the appellant on 20.12.1988, there was no reply. Hence, he preferred a conciliation petition under Section 2 A of the Industrial Disputes Act before the Assistant Commissioner of Labour, Tirunelveli, for taking him to work with usual service benefits and promotion.

2.6. The said petition was opposed by the first respondent Corporation, stating that the appellant/workman was engaged only as a casual labourer at the market rate of wages to look after the materials, stored for construction of new depot building, on the basis "no work, no wages"; since he was a casual labourer, no attendance was necessitated; there was no scope for his permanent absorption; he was not appointed as a Security Guard in the Corporation; he was not issued with any appointment order; the allegation that he served continuously from 18.11.1987 to 15.12.1988 is false; he was engaged for the periods from 18.11.1987 to 16.01.1988; 20.01.1988 to 18.03.1988; 24.03.1988 to 21.05.1988; 01.08.1988 to 25.08.1988 and 14.07.1988 to 12.08.1988 and, thereafter, he was not under engagement by the Corporation.

2.7. On 24.08.1989, the Conciliation Officer passed an order under Section 12 (4) of the Industrial Disputes Act, stating that since both the workman and the management were reiterating their contentions, no conciliation was arrived at and that the workman was advised to raise an industrial dispute before the Labour Court.

2.8. Then, the appellant raised an industrial dispute in I.D.No.552 of 1989 before the Labour Court, Tirunelveli, in which, an award came to be passed on 09.06.1993, directing the management to reinstate the appellant/workman in service with continuity of service and full back wages. The finding of the Labour Court was that the workman established that he worked under the management continuously for 384 days i.e., from 18.11.1987 to 15.12.1988.

2.9. Aggrieved over the said award of the Labour Court, the respondent/management preferred a writ petition, which was allowed by a learned single Judge of this Court, setting aside the award of the Labour Court.

2.10. Hence, this Writ Appeal, at the instance of the workman.

3. The main point that arises for consideration in this appeal is, whether the appellant had been in service for a continuous period of 240 days under the respondent Corporation ?

4. It was not debated that the appellant worked under the respondent Corporation. But, it was disputed by the respondent that the appellant did not work continuously and, instead, he was engaged on daily wage basis with breakups for certain days.

5. The Labour Court, as a fact finding authority, on a thorough analysis of the oral evidence on record and the exhibits produced by both sides, concluded that the appellant had worked continuously for 240 days. It was observed in the award that I.A.No.81 of 1991 was filed by the workman on 16.08.1991, wherein an order was passed on 04.10.1991 that attendance registers and salary receipts ought to be produced by the management. It was also observed therein that a similar request to produce the above said records was made by the workman before the Assistant Commissioner by filing a petition on 16.03.1989, while the proceedings were pending before him, but, there was no response from the management.

6. The contention by the management before the Labour Court was, that while an inquiry was conducted in 1993, the records, required by the workman, were destroyed.

7. Since, under the above said circumstances, the records were not brought out by the respondent Corporation, the Labour Court had taken into consideration the xerox copies of attendance register and other documents, produced by the workman. Exs.A-7 to A-14 are the xerox copies of attendance registers, maintained by the Corporation, for recording attendance of certain staff, including the present appellant. Exs.A-15 to A-18 are the xerox copies of payment vouchers, maintained by the Corporation. The appellant claimed that the above said documents were issued to him by the management itself. The appellant also produced Exs.A-19 to A-21, stating that they are the xerox copies of receipts, for payment of salary. In the cross-examination, when a suggestion was put to the appellant that the above said documents were created by him for the purpose of the case, his answer was in the negative. He also examined two more witnesses on his side as W.W.2 and W.W.3, who were also Security Guards, worked with him, during the relevant point of time. Both of them deposed in a similar tone that the appellant was working under the respondent Corporation continuously. Witness No.3 deposed that his signature was found in Exs.A-9 to A-14. Both the above witnesses were removed from service by the management and they also raised industrial disputes, for reinstatement.

8. Civil Engineer of the respondent Corporation posed as M.W.1 and denied the genuineness of Exs.A-7 to A-14. He deposed, that for payment of salary to the workmen, the Corporation used to get receipts from them. Further, in his cross-examination, he stated that they had not received any receipts from the workmen for payment of wages and, afterwards, he added that such receipts were to be cancelled, after the contents of which were entered in relevant registers. His testimonies are self-contradictory. In an institution like that of the respondent, no money will be disbursed without getting receipts. When that be so, those receipts should have been in possession of the management and produced before the Labour Court.

9. According to the respondent Corporation, the appellant was not in continuous service. But, if the attendance registers and payment vouchers are taken into consideration, it could be seen that the appellant had been in continuous service for over 240 days. Based on the said records and observing that the Corporation had not produced any records to show that there was no continuous service, the Labour Court has rendered a finding that the appellant was in continuous service for 384 days i.e., from 18.11.1987 to 15.12.1988. It was also observed by the Labour Court that even after a request was made by the workman on more than one occasion for production of relevant attendance registers and payment vouchers, the management failed to produce them.

10. The learned single Judge observed that there was no evidence to show that the workman had worked for 240 days and that the Labour Court was not justified in accepting the case of the workman and ordering reinstatement.

11. When there was a categorical admission by the Corporation that they used to maintain payment vouchers for the purpose of payment of salary to the workmen and as per the procedure they used to cancel them after entering the contents in the registers maintained for that purpose, the failure on the part of the Corporation to produce those documents before the Court stands unexplained. Even though the attendance registers were denied by the respondent Corporation, still, there was no embargo for producing the payment vouchers before the Court, to show that there was no continuity of service.

12. Learned counsel for the respondent vehemently contends that the Labour Court has drawn an adverse inference against the management for non-production of certain documents, which is not legally supported, and the law does not require the Court to draw an adverse inference, when a document was not produced by the management. For this proposition of law, he garners support from a decision of the Hon'ble Supreme Court in Municipal Corporation v. Siri Niwas, 2004 (4) L.L.N.785, in which it is held thus :

> "21. Curiously, the respondent produced copies of some muster-rolls before this Court. If he was in possession of the said documents, it betrays one's imagination as to why the same had not been produced before the Tribunal. As indicated hereinbefore, he filed some documents before the High Court but the same were not accepted. The High Court, therefore, proceeded to pass the impugned judgment only on the basis of the materials relied on by the parties before the Tribunal. The High Court, in our opinion, committed a manifest error in setting aside the award of the Tribunal only on the basis of adverse inference drawn against the appellant for not producing the muster-rolls."

13. A careful perusal of the award of the Labour Court would show that it had not drawn any adverse inference for non-production of certain documents by the management/Corporation. Though the Labour Court observed that the documents, required by the workman, were not produced by the management, it intended to proceed, considering the documents exhibited on behalf of the workman.

14. In the case discussed before the Hon'ble Supreme Court, the workman produced copies of muster-rolls before the Supreme Court and the Supreme Court has also observed that had the said documents been with the workman, they might have been produced before the Tribunal, whereas the facts of the present case are distinguishable.

15. In the above said decision of the Hon'ble Apex Court, it is ruled that the burden of proof lies on the workman that he had worked continuously for 240 days in the preceding one year, prior to his retrenchment.

16. In the case on hand, the question of retrenchment does not arise. In order to establish that the appellant had worked continuously for over 240 days, sufficient materials are available.

17. The findings of the Labour Court are very much considered by us and they could bear the seal of approval of this Court. We feel, nothing was wrong on the part of the Labour Court to pass an award in favour of the appellant, relying on the documents produced by him. However, the observation of the Labour Court with regard to payment of back wages requires reconsideration.

18. Keeping in view the peculiar facts and circumstances of this case, we are of the opinion that the direction for payment of full back wages warrants modification and interest of justice would be served, if the respondent is directed to pay 50% of the back wages.

19. Accordingly, the Writ Appeal is allowed in part, setting aside the order of the learned single Judge and modifying the award of the Labour Court, to the effect that the respondent Corporation shall pay 50% of the back wages to the appellant. In other aspects, the award stands confirmed and restored. No costs.

dixit

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To
1.The Presiding Officer,
Labour Court,Tirunelveli.

2.The Managing Director,
Tamilnadu State Transport Corporation
(Madurai Division-III),
Ranithottam, Nagercoil,
Kanyakumari District.

+ One cc to Mr. Edwin Jeyakumar, Advocate sR 38085

ASM (co)

sg 3/7/07

W.A.No.1569 OF 2002
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