

(2011) 04 MAD CK 0257

In the Madras High Court

Case No : Writ Petition No's. 1217 and 1218 of 2011 and M.P. No. 1 of 2011

Chemoil Advanced Management Services Pvt. Ltd.

APPELLANT

Vs

V. Raghunandan and The Deputy Commissioner Tamil Nadu
Shops and Establishment Labor Welfare building Teynambet

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Factories Act, 1948 — Section 2

Income Tax Act, 1961 — Section 25

Tamil Nadu Shops and Establishments Act, 1947 — Section 2(12), 2(5), 2(6), 4(1), 41(2)

Tamil Nadu Shops and Establishments Rules, 1948 — Rule 15, 9(2)

Citation : (2011) 04 MAD CK 0257

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S.R. Rajagopalin, for the Appellant; C. Louis Franco and R. Murali, G.A., for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner has filed W.P. No. 1217 of 2011, challenging an order of the second Respondent Appellate Authority under the Tamil Nadu Shops and Establishments Act (for short TNSE Act), 1947 in TSE-No.II/IA-1/2010 dated 28.10.2010. In the second writ petition, the prayer is for a writ in the nature of prohibition, directing the second Respondent from proceeding further with the appeal filed u/s 41(2) of the TNSE Act.

2. The facts leading to the filing of the two writ petitions were as follows:

The first Respondent herein filed an appeal u/s 41(2) of the TNSE Act, challenging an order of termination dated 29.03.2010 issued by the Petitioner and sought for setting aside the same with consequential direction to reinstate him with continuity of service and other benefits. He also further sought for payment of Rs. 1,38,316/- which included salary for the month of April, Bonus,

LTC, Earned Leave etc. Since the appeal was filed with a delay of 110 days, he had filed an application under proviso to Rule 9(2) of the TNSE Rules, 1948 together with supporting affidavit.

3. In the affidavit filed in support of the condone delay petition, the first Respondent had stated that since his aged parents were unwell and were taking medical treatment including surgery, he had to attend his aged parents and hence, he could not immediately file the appeal and prayed for the condonation of delay. In the said application for condoning delay, notice was ordered to the Petitioner with Diary No. II/1A-1/2010.

4. Instead of giving reply to the averments made in the affidavit filed in support of the condone delay petition, the Petitioner through its General Manager filed an interim counter affidavit contending that the business run by them was carrying on back office service falling under the definition of I.T. Enabled Services. The provisions of I.T. Policy of State of Tamil Nadu will apply to them. The State Government vide G.O.(D). No. 338, Labor and Employment Department, dated 24.05.2000 had exempted the software industries in Tamil Nadu from the provisions of the TNSE Act. Likewise, by G.O. Ms. No. 543, Development dated 10.02.1950, the Government had exempted all persons employed in any kind of work in factories and governed by Factories Act from all provisions of the Act. The I.T. Policy of the State Government, 2002 exempted application of the provisions of TNSE Act to I.T. Companies and I.T. Enabled Companies. It was further stated that since the first Respondent was employed in a managerial capacity, he cannot invoke the provisions of the TNSE Act.

5. The first Respondent had filed a reply affidavit dated 07.10.2010 giving reasons for the delay in filing the appeal.

6. The second Respondent Appellate Authority held that he did not want to go into the jurisdictional issue but will strictly deal with the condonation delay application. He found that there was sufficient cause which disabled the first Respondent from moving the authority. Therefore, after considering the merits of the allegations made by the first Respondent, he condoned the delay and directed the main appeal to be posted for further hearing on 17.11.2010. Challenging the order dated 28.10.2010 condoning the delay, the first writ petition was filed.

7. The second writ petition was filed to issue a writ in the nature of prohibition to the second Respondent from hearing the appeal. Since according to the Petitioner, he totally lacks jurisdiction to deal with the same.

8. In both the writ petitions, notice was directed to be issued to the Respondents on 22.01.2011. Pending the notice, an interim stay was also granted.

9. On notice from this Court, the first Respondent had filed a counter affidavit dated 14.02.2011. This Court is not inclined to interfere with an order passed to condone the delay in filing the appeal especially, when the delay is only 110

days. The authority had exercised his discretion to condone the delay. The Petitioner cannot be put on any prejudice. The TNSE Act provides for a remedy for an employee working in an establishment covered by the Act to challenge an order of termination before the Appellate Authority and it is a valuable right.

10. In this context, it is necessary to refer to a judgment of the Supreme Court in *N. Balakrishnan Vs. M. Krishnamurthy*, . In paragraph 9 of the said judgment, the Supreme Court has held that the condonation of delay is a matter of discretion of the Court. The Limitation Act does not limit the discretion and the length of delay is not a matter to be taken into account and acceptability of the explanation is the only criteria. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion. Normally, the superior court should not disturb such findings. Therefore, this Court does not think that W.P. No. 1217 of 2011 is a fit case to be entertained especially, when the authority had rightly condoned the delay. It is for the Petitioner to file appropriate written statement on merits to contest the appeal filed by the first Respondent.

11. However, Mr. S.R. Rajagopal, learned Counsel for the Petitioner strenuously contended that since the second Respondent had no jurisdiction to entertain the appeal, the writ in the nature of prohibition is maintainable and this Court must consider the objections raised by him regarding want of jurisdiction on the part of the second Respondent to entertain the Shops Act appeal.

12. Before dealing with the merits of the contentions raised by the learned Counsel for the Petitioner, it is necessary to refer to two judgments of the Supreme Court which limit the power of this Court to issue a writ in the nature of prohibition.

13. The Supreme Court in *Isha Beevi on behalf of the Minor Umaiben Beevi and Others Vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Others*, has held that in order to substantiate their right to obtain a writ of prohibition from a High Court, the applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against.

14. Subsequently, the Supreme Court in *Thirumala Tirupati Devasthanams and Another Vs. Thallappaka Ananthacharyulu and Others*, has held that in the absence of very cogent or strong reasons, a writ in the nature of prohibition cannot be issued and it will be an improper exercise. The very court in which the case is pending itself has the power to decide its own jurisdiction. Therefore, there is no reason why the Petitioner cannot raise the jurisdictional issue before the second Respondent authority and invite findings on those issues and if it is adverse to the Petitioner, reserve their rights to challenge after a final order is passed by the authority concerned.

15. Mr. S.R. Rajagopal, learned Counsel for the Petitioner contended that the second Respondent Appellate Authority is a lay person and his position cannot be

equated to a Court. It is too much for them to deal with the issues raised. His argument cannot be accepted as the second Respondent has been given a quasi judicial power and all the issues that are raised before him, he is bound to answer. Even otherwise, if he has any doubt regarding the application of TNSE Act, he can always raise this issue and invite authoritative findings from the Commissioner of Labor in terms of Section 51 of the TNSE Act. But notwithstanding these directions, the learned Counsel for the Petitioner argued on the question of applicability of the Act to the Petitioner company.

16. It is necessary to extract the following stand of the first Respondent asset out in paragraph 4 of the counter affidavit:

The Petitioner is a Shared Service Centre (SSC) and is in charge of rendering accounting and financial transactions processing services remotely (off-shore) relating to businesses of the Parent company. Petitioner is a fully owned subsidiary of the Parent Company and is a centralized accounting unit for the businesses of the Parent Company. In other words it is a Captive BPO service provider operating under the overall policy frame work and directions of the Parent Company. By the nature of its business activities i.e. rendering data processing/back end accounting and financial transactions services relating to commercial/trading transactions of the Parent Company, the Petitioner is an "Establishment" and an "Employer" under Sections 2(6) and 2(5) respectively of the Tamil Nadu Shops and Establishment Act, 1947.

17. The learned Counsel for the Petitioner contended that the first Respondent was employed in the position of Management and therefore, he cannot be a person employed within the meaning of Section 2(12) of the TNSE Act. Since u/s 4(1)(a) of the TNSE Act, persons employed in any establishment in a position of Management are exempted from the provisions of the Act. However, this argument betrays the ignorance of the Petitioner.

18. u/s 5 of the TNSE Act, the State Government has power to notify even in respect of exempted person the provisions of Act. Pursuant to the exercise of its power, the State Government had issued the following notification as early as 05.10.1966. The notification reads as follows:

Application of provisions of Tamil Nadu Shops and Establishments Act to certain class of persons. [G.O. Ms. No. 4074, Industries, Labor and Housing (Labor), 5th October, 1966]

II-I No. 4489 of 1966 .--In exercise of the powers conferred by Section 5 of the Madras Shops and Establishments Act, 1947 (Madras Act XXXVI of 1947), the Governor of Madras hereby applies all the provisions of the said Act to the class of persons mentioned in Clause (a) of Sub " section (1) of Section 4.

19. In this context, it is necessary to refer to the judgment of this Court in Oriental Bank of Commerce, Ltd. v. Commissioner of Labor, Madras reported in 1982 (1) L.L.N.446, wherein a learned Judge of this Court (S. Padmanabhan, J.);

after considering Section 4(1)(c) of the Shops Act and after referring to a notification issued by the Government of Tamil Nadu pursuant to the power conferred u/s 5 of the Act, has made the following observation:

...the provisions of the Act (Shops Act) are applicable to persons employed in any shop in a position of management... This was not disputed by the learned Counsel for the Petitioner. In these circumstances, it must necessarily follow that the third Respondents being a person employed within the meaning of Section 2(12) of the Act would be entitled to maintain an appeal u/s 41(2) of the (Shops) Act.

20. In *L. Subbian v. Deputy Commissioner of Labor, Coimbatore* reported in 1993 (1) L.L.N.875, Srinivasan, J. (as he then was) has held that, in Para 4, at page 876 as follows:

... Section 4(1)(a) of the Tamil Nadu Shops and Establishments Act provides that nothing contained in the Act shall apply only to the persons employed in any establishment in a position of management. But Section 5 thereof empowers the Government to issue a notification applying all or any of the provisions of the Act to any class of persons or establishments mentioned in Section 4 of the Act, other than those mentioned in Cls.(c) and (f) of Sub-sec (1). Thus, with regard to Section 4(1)(a) of the Act, the Government is entitled to issue a notification to the effect that the Act will apply to persons covered by the said Sub-section. The Government has issued a notification G.O. Ms. No. 4074, Industries Labor and Housing (Labor), dated 5 October 1966, by exercising the powers conferred u/s 5 of the Act, applying all the provisions of the Act to the clause of persons mentioned in Cl(a) of Sub-sec (I) of Section 4. Thus, the Act applied to all persons who are employed in any establishment in a position of management. Hence, the Act will apply to the Petitioner also, though he is employed as a supervisor, in a position of management. Hence, the first Respondent is clearly wrong in dismissing the appeal of the Petitioner on that ground.

21. Subsequently, in *Management of Madras Atomic Power Project Employees Consumers Co-operative Stores, Ltd., Kalpakkam* (represented by its Special Officer)v. Deputy Commissioner of Labour, Madras and Anr. reported in 2000(3) L.L.N.1007,P. Sathasivam, J. (as he then was) in paragraph 7 held as follow:

7... As per Section 4(1)(a), a person employed in any establishment in a position of management cannot seek assistance under the provisions of the Shops Act. However, the State Government is competent to include any establishment within the purview of the Shops Act by way of notification in the Gazette. Even as early as on 5 October 1966 the Government have issued a notification stating that all the provisions of the Shops Act apply to the class of persons mentioned in Cl.(a) of Sub-sec(1) of Section 4 of the Act.... It is not clear that even persons employed in the position of management are also covered by the provisions of the Shops Act.

22. Therefore, the contention of the Petitioner that the first Respondent being

employed in the position of Management and therefore, exempted from the purview of the Act cannot be countenanced by this Court.

23. The other contention that the factories coming within the definition of Section 2(n) of the Factories Act, 1948 are exempted from the purview of the Shops Act is concerned, it is necessary to refer the said notification which is as follows:

Grant of exemption to Software Industries in Tamil Nadu [G.O.(Ms.) No. 316, Labor and Employment (C), 24th December, 2004]

No. II (2)/LE/1102(b)/2004" In exercise of the powers conferred by Section 6 of the Tamil Nadu Shops and Establishments Act, 1947 (Tamil Nadu Act XXXVI of 1947) and in supersession of the Labor and Employment notification No. II(2)/LE/ 550/2000 dated the 24th April, 2000, published at page 261 of Part II " Section 2 of the Tamil Nadu Government Gazette dated the 24th May, 2000, the Governor of Tamil Nadu hereby exempts the Software Industries in Tamil Nadu from the provisions of Chapters II and III of the said Act from the date of publication of this Notification in the Tamil Nadu Government Gazette, subject to the following conditions:

(1) The exemption shall be cancelled, if any genuine complaints are received from the employees.

(2) The name board of the establishments shall be exhibited in Tamil in the manner prescribed in Rule 15 of the Tamil Nadu Shops and Establishments Rules, 1948.

24. As can be seen from the above notification, software industries were exempted only from the application of Chapters II and III dealing with opening and closing hours, daily and weekly hours spread over on holidays. In so far as the provision relating to appeal u/s 41(2) of the TNSE Act is provided under Chapter VII, which has not been exempted in respect of those industries. The very fact that the State Government has exempted only Chapter II and III of the TNSE Act, it goes without saying that other provisions will automatically apply to the software industries. Even the earlier notification G.O.(D). No. 338 Labor and Employment, Department dated 24.04.2000 had only exempted Chapter II of the TNSE Act. In respect of the software industries by the new notification, Chapter III has been added for the grant of exemption.

25. Even if it is the case of the Petitioners that their factory comes within the meaning of the Factories Act so as to enable an exemption in terms of the notification in G.O. Ms. No. 543, Development dated 10.02.1950, the said issue is no longer res integra.

26. It must be noted that the Factories Act itself had undergone an amendment by Central Act 20 of 1987. The definition of the term "Factory" as found in Section 2(m) of the Factories Act, though comprehensive to include all manufacturing process carried on in an establishment with or without power, the Explanation II added to the said Act by the amendment with effect from

01.12.1987exempts Electricity Data Processing Unit from the purview of the Act.

27. Explanation II reads as follows:

For the purposes of this clause the mere fact that an Electronic Data Processing Unit or a computer Unit is installed in any premises or part thereof shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof

28. A similar question came up before this Court with reference to the application of Chapter V-B of the I.D. Act in relation to a software company, while the definition u/s 25-L of the I.D. Act defined Industrial Establishment so as to have Chapter V-B applicable to the establishment included factory as defined u/s 2(m) of the Factories Act. But however, after relying upon Explanation II extracted above, the Division Bench of this Court vide judgment in Seelan Raj R. and 14 others Vs. P. O., I Addl. Labour Court and Others, , noted that the Factories Act are not applicable to the Software companies. Therefore, even assuming without admitting that the Petitioner establishment can come within the definition of the term "Factory" since software companies are exempted from the term "Factory" and not governed by the provisions of the Factories Act, the application of G.O. Ms. No. 543, Development dated 10.02.1950 also does not arise.

29. The Petitioner thereafter made a feeble attempt to refer to the so called I.T. Policy of Tamil Nadu made in G.O. Ms. N.15 Information Technology Department, dated 22.05.2003 and G.O. Ms. No. 18 Information Technology Department, dated 05.11.2004 and G.O. Ms. No. 11 Information Technology Department, dated 25.10.2005 for contending that the State Government has exempted application of TNSE Act to the I.T. industry.

30. A perusal of the three Government Orders found enclosed in the second typed set filed by the Petitioner shows there was no such policy evolved by the State Government. On the other hand, all the three Government Orders has merely stated that it referred only to the earlier exemption given by the State Government exempting the software companies from the application of Chapters II and III of the TNSE Act as well as the Self-Certification method in declaring that they are maintaining all the statutory forms prescribed under the Act.

31. Lastly, the learned Counsel made a desperate contention that the Petitioner was not terminated from service. He had sent an email on 01.03.2010resigning from service and therefore, it would not amount to termination by the company. On the other hand, the Petitioner sent a representation dated 23.03.2010stating that his email dated 01.03.2010 was only an offer to resign and not a letter of resignation. On receipt of the said information, the Petitioner company by a communication dated 29.03.2010 had terminated the service of the Petitioner and passed the following order:

I refer to my letter dated 22nd March 2010 and the subsequent discussion between yourself, Mr. Harimaran and me on 27th March 2010. As you still

maintain that you have not resigned, the company is hereby exercising its option to terminate your services effective 29th March 2010 under Clause 7 of your employment letter dated 1st June 2009. You will be paid 1 month's salary in lieu of notice period as contractually stipulated and any other amounts that may be due to you. Kindly collect your Full and Final settlement at a mutually convenient time along with your personal effects.

32. Therefore, it is too late in the day for the Petitioner to contend that there was no termination so as to enable the authority to entertain the appeal. Under the aforesaid circumstances, both the writ petitions are misconceived and bereft of any legal reasons. Hence, both the writ petitions will stand dismissed with a cost of Rs. 10,000/- payable to the counsel for the first Respondent. Consequently, connected Miscellaneous petition is closed.