

(2011) 10 MAD CK 0081

In the Madras High Court

Case No : Writ Petition No. 1943 of 2010

K. Viswanathan

APPELLANT

Vs

Tamil Nadu State Marketing Corporation Ltd.

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Industrial Employment (Standing Orders) Act, 1946 — Section 12A

Citation : (2011) 10 MAD CK 0081

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : C.S. Monica, for the Appellant; S. Muthuraj, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice K. Chandru

1. The Petitioner has come forward to file the present writ petition, seeking for a declaration that the action of the Respondents in denying employment to the Petitioner with effect from 1.5.2005 is illegal, against the principles of natural justice, arbitrary and violative of Article 14 of the Constitution of India and for a consequential direction to the Respondents to reinstate the Petitioner in service with effect from 01.05.2005 with full back wages, continuity of service and other attendant benefits.

2. Even though the Petitioner has sought for a declaration after five years, this Court after noting that in respect of the same Respondent, a Division Bench had entertained the writ petition after five years and hence, the writ petition was admitted.

3. Even after notice, when no counter affidavit was filed, this Court adjourned the matter from time to time and directed counter affidavit to be filed by the Respondents. Accordingly, a counter affidavit dated Nil (March 2011) was filed by the District Manager, TASMACH, Coimbatore sworn to by one C. Subramanian who

also hold the rank of a Deputy Collector under the Revenue Service of the State Government.

4. The case of the Petitioner was that he was appointed as a shop Salesman in the retail vending IMFL shop run by the Respondent Tamil Nadu State Marketing Corporation Ltd., (TASMAC). He was working in Shop No. 1605. He was denied employment with effect from 01.05.2005. On 02.05.2005, he was given a Show Cause Notice as to why he should not be dismissed from service as he was found guilty of selling liquor on the early morning illegally and he was asked to give his reply within three days. The Petitioner gave his explanation denying the charges. It was stated that TASMAC shop is used to be opened at 8.00 a.m. and closed at 12.00 Midnight. Even after the closing hours, between 12.01 a.m and 8.00 a.m., the Petitioner along with two others M/S. Prithviraj and Chandrasekar used to stay in the shop itself. On the morning of 01.05.2005, Prithviraj, who is the Bar attender in order to answer the nature's call went out of the shop by opening the shutter. It was at that time, the District Manager S. Soundarapandian was passing through that area and he questioned as to why the shop was opened at that time. For that Prithviraj replied that there was only one shutter to the shop and only by opening the shutter, they can go out for any purpose. At the time of such enquiry, the Petitioner claimed that he was sleeping inside the shop. Notwithstanding their reply, the Petitioner and the two other employees were denied employment.

5. When Prithviraj, the Bar attender approached this Court, challenging his non-employment, this Court by an order dated 04.10.2007 in W.P. No. 31223 of 2007 set aside the order of termination dated 08.05.2005 and he was reinstated. Another employee by name Chandrasekaran was also reinstated on 26.06.2007 itself on an appeal being made to the Senior Regional Manager. It was stated that the Petitioner sent several representations and none of his representation was considered. It is only the Petitioner, who was left high and dry. Therefore, the Petitioner has come forward to seek for a declaration that his non-employment was not valid. This was in the absence of any written order of termination passed against the petitioner.

6. But however, in the counter affidavit dated Nil (March 2011), the Respondents took a plea that there was an inordinate delay in filing the writ petition. Without prejudice to the contention of delay, in paragraphs 5 and 6 of the counter affidavit, it was averred as follows:

5. Without prejudice the above, I submit that the Petitioner was appointed as Bar Tender in the TASMAC Shop No. 1557 by order dated 02.02.2004. On 08.04.2004, the Senior Regional Manager, TASMAC, Coimbatore made surprise inspection in the above shop and found that the shop personnel indulged in the adulteration of liquor. The Petitioner was caught red-handed and since, the Petitioner was terminated from service on 23.06.2007, as per condition No. 5 of the Appointment Order.

6. I submit that the Petitioner was caught red-handed. Hence, the Petitioner was dismissed from service as per condition of appointment order. Hence, there is no violation of the natural justice.

7. When this counter affidavit was filed, this Court asked the Learned Counsel for the Petitioner Ms. Monica as to why her client did not choose to challenge the order of termination dated 23.06.2007, which was specifically referred to in paragraph 5 of the counter affidavit, the learned Counsel stoutly denied that her client was ever in receipt of any such order. Therefore, she took time to file a reply affidavit by the Petitioner, which was also filed dated 20.09.2011.

8. In the reply affidavit, with reference to paragraph 5 of the counter, the Petitioner has averred as follows:

5... the date of termination is blank in Para 5 of the counter served on my counsel. From the Court copy my counsel Monica found that the date of termination was 23.06.2007 and this fact is totally incorrect as the Respondents have orally terminated the Petitioner on 01.05.2005 and the Petitioner's request for reinstatement was also rejected by the Respondents vide their letter dated 12.09.2005, stating that his explanation was not satisfactory. Thus the averments and facts stated by the Respondents in their counter are not relevant to the case of the Petitioner. Except the cause title, none of the facts mentioned in the counter relate to me. The person, who has signed the counter, without verifying any of the facts and records, has simply signed the counter.

9. In view of the stand taken by the Petitioner, this Court directed the second Respondent District Manager (one C. Subramanian who had sworn to the counter affidavit) to appear before this Court on 27.09.2011 to test the veracity of the averments made by him in the counter affidavit, especially with reference to the averments made in paragraph 5.

10. The learned Standing Counsel was also directed to produce the original file relating to the termination of the Petitioner, which was also produced. Instead of being a continuous running file containing the records arranged in a chronological order with numbered pages, few sheets were tagged together and kept in a brown folder and was circulated. Certainly, this is not the way where the Respondents TASMAL should keep their official records. There must be proper maintenance of records as followed in all Government departments and public sector Corporations. In any event, the second Respondent did not appear before this Court on 27.09.2011. Instead the learned Advocate General along with the Standing Counsel Mr. Muthuraj represented to this Court that the Officer namely, the District Manager, TASMAL, Coimbatore was deputed to receive nomination papers at Panchayat Union, Pollachi (South) in view of the notification of local body elections and because of the pressing election work, he could not appear and requested this Court that his personal appearance may be dispensed with. Therefore, this Court directed the learned Standing Counsel to file a memo to that effect. Accordingly, a memo was filed.

11. On a perusal of the file circulated, this Court found that there is no order of termination passed against the Petitioner much less the order dated 23.06.2007 as claimed by the second Respondent. The learned Standing Counsel fairly submitted that no order has been passed terminating the service of the Petitioner till date. Notwithstanding the fact that there was no termination, the Petitioner had sent a representation to the Senior Regional Manager dated 24.06.2008, (a copy of which is found enclosed in Page 17 of the typed set) bringing to his notice that he was not given any employment. The acknowledgment received from the office of the Senior Regional Manager is also found at page 18. Subsequently, the Petitioner had sent a representation dated 30.03.2009 to the Managing Director, TASMACH, viz., the first Respondent and the acknowledgment received from the office of the first Respondent is found at page 23. His further representation to the Senior Regional Manager dated 16.09.2009 was also produced and the proof of delivery of having received is also found at Page 26 of the typed set. Lastly, the Petitioner had also sent a representation to the second Respondent District Manager, dated 14.12.2009. In that representation, he had mentioned about the fact that M/S. Chandrasekaran and Prithviraj being restored to service whereas the Petitioner alone has been kept high and dry. The second Respondent instead of referring to these representations in the counter affidavit and to explain the steps taken by them to deal with those representations has come forward with a false affidavit stating that the Petitioner was terminated on being caught red handed and that condition No. 5 of the appointment order was resorted to.

12. In the original file produced excepting the show cause notice dated 02.05.2005 and the order dated 12.09.2005 informing the Petitioner that his request for restoration cannot be accepted, there is no order terminating the services of the Petitioner is found. Notwithstanding the same, a false counter affidavit has been sworn to by the second Respondent. Therefore, this Court has to take a serious view of such swearing false affidavit by denying the rights of a workman who have approached this Court with a writ petition filed under Article 226 of the Constitution. Even in the written instructions addressed to the Government Pleader dated 15.05.2010, they have not come forward with the true factual position as can be seen from the following paragraph in the letter:

During the courses of surprise inspection, the District Manager, TASMACH, Coimbatore on 01.05.2005 at 5.45 am found that the shop No. 1605 was opened and that liquor was sold stealthy by the Petitioner who stated in the above shop. This also found that the liquor was selling by mixing the water with liquor. As the Petitioner was caught by the red hand, the District Manager, TASMACH, Coimbatore, has issued a show-cause notice on Petitioner to submit his explanation on the above allegations in this office reference cited. He has also issue orders, terminated the Petitioner from service as the above allegations were proved. The Petitioner has preferred an appeal before the Senior Regional Manger, TASMACH, Coimbatore confirmed the orders of the District manager, TASMACH, Coimbatore by rejection the appeal petition. Aggrieved by this orders,

the Petitioner has filed the W.P. Is No. 1943/2010, before the High Court, Chennai. This case is pending disposal.

13. In the parawar remarks submitted, they have harped on the same theme of having issued a termination order and the Petitioner having filed an appeal which was rejected by the Senior Regional Manger, thus confirming the order of the District Manager. On the contrary, the Petitioner in his writ petition had not chosen to challenge any specific order since no order of termination was passed against him.

14. In the light of these contentions, it can be clearly seen that no order of termination was ever passed against the Petitioner. Even assuming that the Respondents can rely upon Clause 5 of the terms of appointment, that will not enable them to terminate any person with a summary dismissal. Clause 5 of the terms of appointment may be usefully extracted, which is as follows:

5. In case of any breach of rules and Regulations, the instructions of your superiors and the duties assigned to you, your temporary/contract basis appointment is liable to be summarily terminated along with forfeiture of security deposit.

15. Notwithstanding the fact that such conditions were incorporated in the terms of appointment order, this Court had held that the Respondent TASMAL is covered by the provisions of the Industrial Employment Standing Orders Act, 1946 (for short IESO Act) and in the absence of any certified Standing Orders, the Model Standing Order framed by the State Government will apply in terms of Section 12-A of the IESO Act. The Model Standing Order provides the procedure for taking disciplinary action which includes framing of charge sheet, conducting an enquiry, issuance of second show cause notice and passing final orders after taking note of all circumstances proportionate with the gravity of charges. These steps have been totally absent in dispensing with the service of the Petitioner. Even if the authorities are not aware of the legal provisions, they should have observed elementary principles of conducting an enquiry before dispensing with the service of the Petitioner.

16. As to what constitutes elementary principles of an enquiry, the Supreme Court vide its judgment in *Meenglas Tea Estate Vs. Its Workmen*, , in paragraph 4 held as follows:

4...It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. He must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out

against him....

17. The Respondents have not discharged their obligation expected under law. When the Petitioner made representation in bringing to their notice the relief given to M/S. Chandrasekaran and Prithviraj, they kept silent and have not replied to the Petitioner. On the contrary, when he moved this Court they have deliberately come to this Court with a false statement to deprive the legitimate claim of the Petitioner in getting redressal from this Court. Even though the Petitioner has moved this Court after six years of his non-employment, it cannot be said he was remaining idle but he had sent representation to all the authorities concerned. When he was relieved of duty and no final order was passed, after waiting for a reasonable time, he had moved this Court even in the absence of any order for a writ in the nature of declaration. Therefore, this Court is not inclined to non-suit the Petitioner on the ground of delay as there is no delay in the facts and circumstances of the case. Therefore, the Petitioner is entitled to succeed for a declaration sought for in the writ petition.

18. The Respondents being state owned Government company cannot behave in the manner it had behaved with the Petitioner as well as before this Court. The second Respondent is holding the post of District Manager in the rank of Deputy Collector in the Revenue service and he is not expected to make false statement before this Court. The Petitioner is entitled to succeed. Further, exemplary cost will have to be imposed on the second Respondent for having sworn to a false affidavit before this Court and he had tried to obstruct the normal course of justice. Since M/S. Chandrasekaran and Prithviraj, who were also involved in the same transaction were restored to service, this Court is not inclined to order any fresh enquiry. Hence, a direction will issue to restore the Petitioner in the service held by him i.e., to the post of Salesman with continuity of service, full backwages and other attendant benefits within a period of four weeks.

19. With reference to the cost, the Learned Counsel Ms. C.S. Monica referred to a judgment of the Supreme Court in Central Co-operative Consumers' Store Ltd. Vs. Labour Court, Himachal Pradesh at Shimla and another, wherein the Supreme Court on finding that when the authorities take a cantankerous attitude in pursuing the litigation, it even gone to the extent of recovering the amount from the officer concerned toward the backwages paid to the workman who was made to suffer. In paragraph 5, it was observed as follows:

5. Public money has been wasted due to adamant behaviour not only of the officer who terminated the services but also due to cantankerous attitude adopted by those responsible for pursuing the litigation before one or the other authority. They have literally persecuted her. Despite unequal strength the opposite-party has managed to survive. We are informed that the opposite-party has been reinstated. This was put forward as bona fide conduct of Petitioner to persuade us to modify the order in respect of back wages. Facts speak otherwise. Working life of opposite-party has been lost in this tortious and painful litigation of more than twenty years. That for such thoughtless acts of its officers the

Petitioner-society has to suffer and pay an amount exceeding three lakhs is indeed pitiable. But considering the agony and suffering of the opposite-party that amount cannot be a proper recompense. We, therefore, dismiss this petition as devoid of any merit and direct the Petitioner to comply with the directions of the High Court within the time granted by it. We however leave it open to the society to replenish itself and recover the amount of back wages paid by it to the opposite-party from the personal salary of the officers of the society who have been responsible for this endless litigation including the officer who was responsible for terminating the services of the opposite-party. We may clarify that the permission given shall have nothing to do with the direction to pay the Respondent her back wages. Step if any to recover the amount shall be taken only after payment is made to the opposite-party as directed by the High Court.

20. In the present case, it is the Petitioner who has come to this Court. Therefore, this Court had proposed only to order cost of Rs. 20,000/ which is the legal fees payable to the counsel for the Petitioner. The amount so paid towards cost shall be recovered from the second Respondent District Manager (TASMAC) who has sworn to a false affidavit and filed it before this Court.

21. The writ petition is allowed accordingly. The cost of Rs. 20,000/ shall be paid to the counsel who appeared for the Petitioner in this case.